131-191

Supreme Court of the United States.

No. 15.—October Term 1887.

THE CITY OF NEW ORLEANS

vs.

MYRA CLARK GAINES.

THOMAS J. SEMMES,
For Appellees.

Press of Thomas McGill & Co., Washington, D. C.

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vs.

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It seems to me that the case is to be determined on the demurrer to the bill—on that portion of the answer and proofs which relates to rents and profits, and on the Master's report.

The demurrer raises three questions: 1. Does the bill disclose a cause of action? 2. Is the cause of action cognizable in a Court of Equity? 3. Is the cause of action barred by prescription?

The answer, so far as rents and profits are concerned, sets up—

1. Prescription of one, three, and ten years.

2. Good faith of the defendant, but not the good faith of any of the defendants in the Agnelly and Monsseaux cases, Nos. 3663 and 6085.

3. The fraudulent and irregular character of some of the decrees rendered in the Agnelly and Monsseaux cases, and the payment of others; but there is no specification of any particular decree affected by fraud or irregularity or of any decree paid to complainant.

4. That the decree in the suit of Mrs. Gaines *v.* City of New Orleans, No. 2695, precludes the complainant from bringing this suit.

5. That the persons warranted in title by the City of New Orleans are citizens of the State of Louisiana, and they could not enforce their contracts of warranty against the City in the Circuit Court of the United States. No deduction from this fact is made by the answer. I presume it means to insinuate that, therefore, Mrs. Gaines, as an *assignee*, cannot bring this suit.

6. "That in other cases [I quote the answer], said defendant has a fuller and complete legal defense against any demand based on said supposed covenant of warranty, if the same was set up by the supposed warrantee." (P. 46.) I suppose this means that if the City had been sued by its vendees on her warranty, she could have successfully defended the suit. How this could have been done, or what was the defense which could have been urged, is not stated.

7. That the defendant had transferred her interest in this suit to some unknown person.

8. That the unimproved portion of the "Blanc Tract" was worthless, and that no revenue could have been realized therefrom, owing to its uninhabitable condition.

I pass over a variety of other defenses set up in the answer, because the defendant had no right to urge them under the terms of the order imposed upon her when the *pro confesso* was set aside; and for the further reason that they have been repeatedly adjudicated by this Court in favor of the complainant, and, if not *res adjudicata* as to the defendant, are defenses which the court will not re-examine. The defenses mentioned under the Nos. 5, 6 and 7 were not supported by any evidence and will not be referred to again.

The bill was filed 7th August, 1879, and the subpœna was served next day. Appearance for defendant was entered on September 1. On October 6, the time to plead, answer or demur was extended to the rule day in December. On that day, a *pro confesso* was entered, the

defendant having failed to plead, demur or answer. (P. 29.) Next day application was made by the defendant to set aside the *pro confesso* and for leave to file a demurrer. The Court thereupon entered the following order on 6th January, 1880: "That upon payment of costs to date, and signing a stipulation to speed the cause and consent to a hearing upon the demurrer within five days, the defendant has leave to file the demurrer, provided it be done forthwith; and in case the demurrer should be overruled, the Court will impose further terms upon defendant should such be deemed just." (P. 32.) The defendant consented to the terms. (P. 34.) A general demurrer was filed 6th January, 1880. It was argued for several days and submitted on 23d January. On 27th March the demurrer was overruled, and the following terms were imposed on the defendant, pursuant to the reservation contained in the order of January 6th: "It is ordered that the demurrer be overruled with costs and that defendants have leave, as they may be advised, to file within ten days a demurrer to all of complainant's bill, excepting that portion which seeks to recover from the defendant the rents and profits acquired or realized, or which might by reasonable diligence have been acquired or realized, revenues and value for use by the actual occupants of the property described in the bill, namely, subdivisions eleven and twelve of said bill, and of the printed copy of said bill the second paragraph on page 21, the second paragraph on page 22, the second paragraph on page 23, and the whole of page 24, as well as subdivision fifteen of said bill.

"And under the reservation in the order heretofore made, and for the purpose of speeding the cause, the Court imposes as terms, and it is further ordered, that said defendant answer the said excepted portions of said bill within the period of ten days from the date of this decree, and that said defendant forthwith proceed to account before Ernest Sabourin, Master, for the rents

and profits acquired and realized, or which might by reasonable diligence have been acquired or realized, by the actual occupants of said property, including all revenues and values for use." (P. 35.)

It is clear that under this order the defendant was not allowed to dispute any averment in the bill in regard to matters not included in the excepted portions above mentioned. The object of the Court was to prevent a useless consumption of time in the investigation of matters which every one believed had been definitely settled. I allude to the averments in the bill that the complainant was the only legitimate daughter of Daniel Clark, and by his last will, made in 1813 and probated in 1855 by the Supreme Court of Louisiana, became his universal legatee and inherited the property known as the Blanc Tract, which is set out in the bill by metes and bounds; the institution of suit by the complainant in June, 1836, against the City of New Orleans, known as Suit No. 122, to recover, among other property, the Blanc Tract, then in possession of the City of New Orleans, who on the 30th October, 1821, acquired it from Evariste Blanc, who had purchased it from Relf and Chew, executors of the will of 1811 and attorneys in fact of Mary Clark, universal legatee under said will; the answer of the First Municipality, admitting such possession and its derivation from Relf and Chew, as executors of Clark, through Evariste Blanc; the institution, on December 22d, 1836, of complainant's suit against the City of New Orleans, known as No. 2695, in which she claimed the Blanc Tract under the probated will of 1813; the averment of defendant in the answer filed to that suit of her derivation of title to the Blanc Tract had been through Blanc from Relf and Chew, executors of Clark and attorneys of Mary Clark, universal legatee under the will of 1811, and that she had sold the same to various parties, except

five squares described in the answer; the final decree of the Circuit Court, dated 11th June, 1870, rendered in conformity to the opinion and decree of this Court announced at its December Term, 1867; that the said decree of the Circuit Court declared the complainant "to be the only legitimate child of Daniel Clark, and as such exclusively invested with the character of such legitimate child and entitled to the rights of the same, and that under and by virtue of his last will and testament she is the universal legatee, and as such is entitled to all the estate of which he died possessed, including the said tract of land set forth in said bill and this bill, being the tract so sold by said Relf and Chew as testamentary executors, etc., to Evariste Blanc on 30th Oct., 1821, and by said Blanc to the City of New Orleans on the 20th September, 1834, and that the said pretended sale of the 30th of October, 1821, and 20th September, 1834, were utterly unauthorized, illegal, null and void, and in derogation and fraud of the rights of your oratrix, and that the said City of New Orleans immediately surrender to the complainant that portion of said property which at the filing of said bill remained unsold and in possession of said city, and that an account be taken by Jno. B. Weller, Master in Chancery, of the yearly rents and profits of said land whilst in possession of said defendant"; that owing to the sales of said property of the City of New Orleans, it became necessary for the complainants to institute suits against the various purchasers to obtain possession; that she was forced to institute suits in the District Court of the Confederate States, in 1862, as the Government of the United States at the time was deprived of actual jurisdiction over the territory of Louisiana; that said suits remained untried during the continuance of Confederate authority; that upon the reorganization of the Circuit Court, she instituted suits against various parties then in possession of

various portions of said property, being suits entitled Gaines *v.* Monsseaux *et al.*, No. 3663, and Gaines *v.* Agnelly *et al.*, No. 6085 ; that decrees were rendered in favor of complainants and against said possessors for the property, and that said suits were referred to Masters Gurley and Sabourin to determine the amounts of fruits, revenues, and value for use of said property during the respective possessions of said defendants ; that by said decrees in said suits 3663 and 6085 it was adjudged, not only as had been previously adjudged in the said suit No. 2695 against the City of New Orleans, that the sales of Oct. 21, 1821, by Relf and Chew, executors of Clark, to Evariste Blanc, and of Sept. 25, 1834, by said Blanc to the City of New Orleans, were illegal, null, and void, but that all subsequent conveyances by which the said property was attempted to be transferred and conveyed to said respective defendants, were made without any legal right or authority whatever, and were wholly unauthorized and illegal and utterly null and void, and a fraud upon the rights of the complainant ; and that judgments had been rendered against the various defendants in said suits in favor of complainant, on the reports of said Masters as to said fruits, revenues, and values for use."

There could be no dispute about these averments, inasmuch as they were evidenced by judicial records, which were subsequently introduced in evidence, in consequence of the defendant's disregard of the terms imposed on her by the Court. It is equally clear that the reference to the Master Sabourin, made on 27th March, 1880, was merely for the purpose "of *taking an account* of the rents and profits acquired and realized, or which might by reasonable diligence have been acquired or realized by the actual occupants of the said property, including all revenues and value for use."

It is therefore plain that if the demurrer was properly

overruled, the case in this Court turns on the exceptions to the Master's report and the defenses in the answer which I have enumerated.

I propose to consider, first, the Master's report, and then to discuss the three questions raised by the demurrer and the defenses in the answer to which I have called the attention of the Court.

The Master divides the property into two classes, improved and unimproved. He ascertains when the improvements were put on each lot or square, and estimates the value for use of such lot or square while it was unimproved, and then ascertains the rents and revenues derived from it since the date of the improvements; all other lots and squares are treated as unimproved, and as to those he estimates the value for use.

As to the improved lots and squares, the Master says that he has already had under consideration the rents and revenues derived from such improved property in the suit No. 3663, Gaines *v.* Monsseaux, and in the suit No. 6085, Gaines *v.* Agnelly, in which actual rents, revenues, and value for use were found and reported on by him, except five cases which were reported on by Master J. W. Gurley, Jr.

He then proceeds to enumerate the cases reported on by him and by Master Gurley in said suits, No. 3663 and No. 6085; he furnishes the names of the several occupants, the respective numbers of the lots and squares occupied, and the dates of the respective improvements, and the amounts of rents and revenues derived by each defendant, and then says: "In all of the above-mentioned cases of improved property in said tract of land, the same evidence upon which the original reports were based and the reports themselves, together with the judgments of this Honorable Court confirming the same, having been offered by the complainant before the

Master, and no evidence of any kind except that originally before the Master, was introduced by the defendant in this cause to vary or change the findings of the Master in any of said cases, the several findings of the Master having been once before approved by the Court as just and correct, after opposition and argument, the Master undersigned, upon a full reconsideration of all of said cases, can see nothing to alter his judgment as then formed and reported, nor any change to be made in the five reports not prepared by him. He therefore reports that all the evidence on said matters of improved property adduced by both parties in this cause being considered, the amounts reported by him and by J. M. Gurley, jr., Master, as hereafter set forth, for the time or times expressed in each of the several stated cases, as due for rents, revenues, and value for use, are the amounts which he now finds and declares to be the actual and proven rents, revenues, and value for use for the said parcels or lots of ground during the time of the possession of the said several-named parties, said time beginning from the respective dates of the first improvements of each occupant, and continuing to the respective dates of the cessation of occupancy by all and each of said possessors, it being here remarked by the Master, and assumed by him in the absence of any direct proofs regarding the matter, *that the date of possession by complainant was the date of each of the aforesaid several reports.* Interest has in this respect been calculated from the dates of each of said reports to 10th January, 1881, for uniformity, and as a matter of course will run on the sums found as being the revenue or value derived from the improved property, at the legal rate of this State—five per cent. per annum from the 10th of January, 1881." (P. 872.)

The Master then adds the following observation: "It should be mentioned that the above statement of

revenues represents the net amounts found after deduction of all expenses and charges, interest at the rate of five per cent. per year having been allowed in each case upon the cost or value of improvements, and in every instance when proven all the State, city, drainage and other taxes, with five per cent. interest per year thereon from the dates of payment, being deducted from the gross revenue or value for use."

The report of the Master then treats all other property in the Blanc Tract as unimproved. He gives the number of the lot and square of each parcel of land, and declares that the unimproved lots and squares thus designated, together with the improved property above mentioned, comprise the whole of the claim of the complainant in the Blanc Tract.

He then says, as to the unimproved property, the evidence on behalf of the defendant has been chiefly directed to the establishing of the contention, that the soil so left vacant was not fit for use; that it would have been useless to have endeavored to do anything with it; that for years it had been, and was destined to remain, barren and untouched by the hands of man; and therefore the complainant was entitled to nothing on account of her dispossession for some forty-five years. He fairly presents the evidence on this subject adduced by the defendant, and occupies in so doing over two printed pages of the Record, pp. 874–876. He thus disposes of the matter: "But clearly-proven facts are, in the judgment of the Master, more conclusive and convincing than mere theories, or opinions, or a vague remembrance dating back to fifty years, and the latter must give way to the former. It is not established, nor does it appear in any manner, that the squares and lots remaining unimproved are or were of a notably worse nature, or in a worse condition, or less susceptible of improvement, than those herein previously inquired

into, and cited as having been improved and put to use and profit. Yet in the sixty-four cases above referred to in detail, and the location of the whole of which by squares, with the number of the lots, is given, it was found, after full examination, that people with their families lived in those places, had nurseries, gardens for vegetables or flowers, plantations of fruit trees and of ornamental bushes or shrubbery, kept dairies, and both housed and pastured their stock. Some even had costly and luxurious places; some lived on their possessions; others derived profit by renting them, and thus as to those possessors a revenue or value for use was created. And when the aggregate of the revenue or value for use reported against them, and approved by this Court, as above specifically set forth, is considered, on a comparison with an allowance heretofore made by this Master in *ninety-four cases of possessors of vacant property* in said suits for 3663 and 6085, Gaines *v.* Mousseaux and Agnelly, said allowance being five per cent. on seventy per cent. of the price of adjudication at the sale at public auction made by the City on the 10th March, 1837, the revenues actually produced would be as thirteen per cent. is to five per cent. In other words, comparing the improved with the unimproved lots, that where the Master gave five per cent. for the unimproved, the complainant, if the same property had been improved and used, would have obtained thirteen per cent. net, all expenses and charges deducted, only six of those sixty-four cases being below five per cent., and only four being exactly, or a little over, five per cent., all the others being much above five per cent., as compared with the allowance on the vacant property. * * In all of the above-mentioned cases, where men possessed for their own use, to inhabit, to cultivate, or to improve, to build and to rent, and managed their own business as men usually do who desire an immediate

profit from their labor and investment of money, they derived revenues. And the fact is striking, that in the greater number of such cases that came before the Master, revenues were not produced by the lavish expenditure of the capitalist, but by the persistent, unremitting efforts of the humble, hardy sons of toil and of their families. The cause of the inactivity of certain possessors is shown by the fact testified to, that the fear of eviction kept them from improving, and, as stated in evidence, no one or very few desiring to rent vacant and unimproved land in the City, no revenue could be produced by, nor profitable use made of, their vacant and unimproved possessions under their uncertain and precarious tenure. It is equally clear that a speculator, a large holder of unimproved property, cannot and does not give to its improvement that close attention, that vigilance, or that energy which the ordinary paterfamilias, who purchases for a home or for immediate revenue, will give to the small quantity of land he may hold as owner. As one of the defendant's witnesses very truly and forcibly remarked, he built as soon as he could upon a piece of vacant land, as soon as he purchased, so that he could have revenue from it; and, in the estimation of the Master, the result of the labor, industry, and intelligent management of the possessors, who actually did put to use and improve the land as good fathers of family, is to be taken as the true criterion of the capabilities of the soil, which their co-possessors have either refused or neglected to use in any manner. For the reasons aforesaid, the Master finds as a fact, and so reports, that the natural expansion of the City of New Orleans, its development in buildings and improvements, rendered the occupation and use and cultivation of those lands possible, and that the only reason which prevented such a use of them was the fear on the part of the pretended owners and of the public

that the title of the complainant was the true title, and that had she been in possession of that which has been finally adjudged her own, this land would have been the source of revenue. * * * Those very lands, improved as well as unimproved, when sold on a credit for part of the purchase price, called for 8 per cent. interest on mortgage notes, secured by vendor's lien, from date of sale to final payment. Evidence has also been adduced of the sale of property within the city limits and its suburbs on ground rent for a number of years, many of those rents being still in existence, all redeemable at the will of the purchasers, provided the annual rent was punctually paid; others, though redeemable at will after a stipulated time, yet not to be redeemed before twenty-nine years; forty-nine of the sales in evidence having been made by the City of its own property and forty-six by Daniel Clark; those by the latter in 1809 and subsequent years, 6 per cent. on the capital or fixed value of the property sold being the amount of yearly interest to be paid, thus showing, in a measure, if not conclusively, the value of naked property in this city up to the present time. Evidence of an undoubted character has also been adduced that at the time of the adjudication the drainage of said tract of land was satisfactory; that drainage machines were built and in operation as far back as 1835, and a completely new building for the draining machine erected in 1845, and that it was only on occasions of exceptional floods, or of stoppage of the machine, or of allowing the ditches to fill up, that water was not promptly drained off. It was also proven that a valuation of $2,400, less $500 per year for expenses, or $1,900 net, was estimated to be a fair rental value for square No. 46, on which nothing but the City's draining machine was put up, a valuation maintained as not unreasonable by the decree of the Supreme

Court of the United States in the suit of Gaines v. City of New Orleans, 15 Wallace, p. 124; and no vacant square in this reference is under the allowance of 5 per cent., estimated at a sum exceeding $614 rental value per year, the estimate for the other vacant squares being generally far less, though all except one or two are considerably larger than said square 46. Evidence has also been introduced of the reality and validity of the sales made by the City in March, 1837; of suits having been instituted by the City on some of the purchase notes and judgments obtained thereon, and especially of a number of deeds of sale actually passed before De Armas, then a notary of this city, amounting in the aggregate to $279,375, from which deducting $13,675, price of two lots in square 1, five lots in square 2, of nine lots in square 41, and of nine lots in square 42, not in this reference, and adding to the principal, $6,450, amount of one judgment obtained by the City, in the case of a sale not perfected, there would remain the sum of $272,150 secured by vendor's lien and mortgage, and by endorsers approved by the City as specified in the said evidence, which amount, it is fair to presume, in the absence of proof to the contrary, the City did actually receive from said sales of 1837. If we resort, as an illustration, to a system adopted at common law, which is certainly fair and equitable and substantially authorized by the laws of this State, (Revised Civil Code, Art. 1944) to capitalize interest and principal, at the end of a certain number of years, on claims running without settlement through a long period of time, and if we say that interest should be capitalized on the above sum received of the city every ten years from 1837, (this being done merely to demonstrate the equitable side of the question,) the City would stand a debtor as follows: Ten year's interest on $272,150 at 5 per cent. would be $136,070, which added to the principal

would form the sum of $408,220, say in 1847; ten years' interest on $408,220 at 5 per cent. would be $204,110, which added to the principal would form the total sum of $612,330, say in 1857; ten years' interest on $612,330 at 5 per cent. would be $306,160, which added to the principal would form the total sum of $918,490, say in 1867; ten years' interest on $918,490 at 5 per cent. would be $459,240, which added to the principal would form the total sum of $1,377,730, say in 1877. This amount would leave out of calculation a great many lots in the squares now being investigated, and would not comprise eighteen whole squares subject to this reference.

Now, if it be assumed that the City not only received $272,150, for which deeds of sale were actually passed, and endorsed notes given, but that she did receive, as she could, and may have enforced payment by virtue of her right to accept or reject at once the proposed securities of the bidder at auction sale, the sum of $210,375 more for the price of sale of the whole eighteen squares, Nos. 17, 20, 23, 24, 25, 31, 32, 36, 37, 40, 43, 47, 50, 56, 58, 59, 60, and 63, for which there is before the Master evidence of adjudication, but no proof of deeds of sale executed nor of notes given, (letting alone and not accounting for $86,405, amount of price of adjudication of certain lots in squares sold to different parties, for which no evidence of deeds of sale appear,) we find the total sum of $482,525 as having been received by the City."

He then proceeds to capitalize the interest on that sum at five per cent. every ten years, and shows that the amount of principal and interest in 1877 would be $2,430,000, and the amount at simple interest for forty years would be about $1,442,525.

He arrives at the conclusion that five per cent on seventy per cent of the prices realized at the auction sale

in 1837 is a just and fair allowance for rents and value for use, which should be allowed for the unimproved property, and he refers to his three several reports filed in the Monsseaux suit, No. 3663, as containing specifically the reasons which induced him to adopt that allowance. (P. 878-9.) One of the reports thus referred to and adopted as part of the report in this case, is found at page 765, and contains an elaborate discussion of the law and the facts. At page 790, the Master discusses the right to an allowance for the unimproved property. He says: "There can be no question as to the right of the complainant to a compensation. Reason itself plainly indicates that one cannot unjustly deprive another of his property during a period of years, whether long or short, and not have finally to indemnify the true owner, whom the courts have recognized. Whether the defendants have used the property or not does not matter. The complainant has been wrongfully deprived of her property. The possessors in bad faith have thereby assumed all risks concerning the use and employment of the same, and are liable. If they have suffered those lands to remain idle and unproductive for years, whilst the City around them was growing and improving, and have thus kept the rightful owner from putting them to use, as she might have done, the fault is theirs, and they must account for the loss. Under the law, and in accordance with the principles of natural equity, as demonstrated hereabove, especially at pages 46 and 47 *et seq.*, persons in bad faith owe not only the profits they have derived but also all those that might have been derived from the property in their possession. The owner is absolutely entitled to all that the land might possibly have brought. To escape the consequences of their illegal possession they must prove, not that no benefit was derived, but that no benefit could by any reasonable means have been derived therefrom. This they have not

done, and, indeed they could not do. On the contrary, it is in evidence before the Master, and it is also a matter of public notoriety, that the land is not even so low as lands running from Carondelet walk (the lowest part and western boundary of this 'Blanc Tract') to and past Canal street, and that, nevertheless, in this part of the City where titles are not in controversy, valuable improvements have been made, buildings have been erected, lands have a high value, and the fact of their being low and also subject to overflow has not been and is not pronounced a cause of intrinsic and utter worthlessness. In fact, this objection could be made with equal force against the whole City, because everywhere in the most valuable portions of the first, second, fourth and sixth districts the level of the lots has been, and needed to be, raised by filling in order to avoid overflow. Lowness of the land in this low-leveled city is not in itself a cause of non-production of revenues." (P. 791.) * * *

The complainant has produced two witnesses—Messrs. J. W. Davis and E. A. Deslonde—men of knowledge and experts in this matter, knowing the values of property and of rents, who established the value of the yearly rental of the aforementioned lands at the rate of five per cent. net; that is, five per cent. over and above the taxes, &c., on the value of the property. (P. 792.) * * *

The Master then alludes to the variation in prices obtained at the sales in March, 1837, and in the years 1846 and 1848, and says: "Those variations do not seem to have depended on the more or less favorable position of the lots, nor on their intrinsic value, the fluctuations being unaccountable and almost fanciful at times, perhaps arising from variations of conflicting hopes and fears, in accordance with the different phases of the present protracted litigation on the question of ownership. The assessment rolls also present the same phenomena

of seemingly fitful valuation. A large portion of this tract has remained totally unimproved. Complainant contends that the yearly rental or value for use must be computed on the prices obtained by the city at the public sale in 1837, because, as she alleges, the contest as to the title, not being so generally known to the public, nor deemed important at the time, the prices in that year were more nearly the true value of the property, being purchased with the warranty of a wealthy city, than the prices obtained at any time since, for in all subsequent sales there was a cloud on the title, publicly known, which depreciated it, and made the sale for an adequate sum an impossibility. That the prices ever since have fluctuated greatly, and very frequently in the ratio of the success or failure of the complainant in the several stages of her law suits, and that the property should be worth as much, with all the improvements, such as the wharves and broad streets, canals, horse railroads, shell roads, buildings on or around it, as in 1837, when none of those ameliorations and inducements existed." (P. 793.)

He then says that, on the other hand, the defendants contend that prices for all property in the city were inflated in 1837 sixty per cent. above the true value; that in 1848 they had fallen another twenty per cent. from the prices in 1837, though in 1850, 1851, and 1852 prices had appreciated to within thirty-five to forty per cent. of the prices of 1837. He then refers to the testimony of two witnesses for the defendants, Pilie and D'Hémécourt, surveyors of old standing, who testified that the effect of the financial crisis of 1837 was to lower prices from fifty to sixty per cent.; and that later, in 1848, they fell another twenty per cent.; that property never was so low as it is now; that since 1837 property had reached its highest value in 1850, 1851, and 1852, when it become worth about thirty-five or forty per

cent. less than the prices of 1836 and 1837; that their estimate of the real value of each lot in 1837, at $15, and $40 now, with a good title, is clearly untenable and contrary to public estimation and to the views of purchasers, as those lots have, despite all uncertainties and disputes of title, averaged over $150 per lot since the last thirty years, and as improvements worth $1,000 have within even fifteen months past been placed on the same. (P. 794.)

The Master further says:

"Those witnesses also say that the ground is valueless, because it is low and frequently overflowed, either from heavy rains, or from the breaking of the levees of the canal; but this opinion loses its force when the same witnesses subsequently say, on cross-examination, that the grade, both at Ursulines and Dumaine streets, at the intersection with Broad street, is much higher than the grade at the intersection of Canal and Broad or Common and Broad streets; that the property at both of said last-named locations is reached nearer to the river by overflow from the lake, and yet this lower and more inundated property is worth much more, even at present date, than the others of a higher grade in the ratio, say they, of $1,500 per square at the corner of Dumaine and Broad to $6,000 per square at the corner of Canal and Broad, thus showing conclusively that land in this City is not valueless merely because it is low and subject to temporary overflow. Moreover, as publicly known, the greater part of this City, even up to its very center, is composed of low ground, more or less subject to temporary overflow in heavy rains, and the only mode of escape, at least to a degree, is by filling the lots or raising their grade as high as possible, and the inconvenience being general, it does not for that cause alone impair values in one part of the City more than in another. Further, it is shown that much of this overflow in heavy rains is due to defective drainage, the only draining machine for this Blanc Tract having been removed by the City since the war, the ditches being filled up and even the drainage canals filled up and choked.

"All of this, it seems probable, owing to neglect, caused by the large portion of this property kept unimproved. It has also come to the knowledge of the Master, in evidence taken during the investigation of the case referred to him, that in at least thirteen instances the rolls of 1870 and the purchase prices of the lots show values over seventy per cent. (70 per ct.), and reaching sometimes the full amount of the prices obtained at the auction sale of 1837, to wit, one lot, No. 37, in square 54, (case of Hernandez,) assessed $400 in 1870, sold for $400 in 1837; three lots, Nos. 16, 17, and 18, in square 60, (case of A. Rochereau,) assessed for $1,200 in 1870, sold for $1,650 in 1837, (being over 70 per cent.); one lot, No. 34, in square 54, (case of Gallagher,) assessed for $400 in 1870, sold for $400 in 1837; three lots, Nos. 6, 7, and 8, in square 54, (case of P. Howard,) assessed for $1,200 in 1870, sold for $1,275 in 1837; two lots, Nos. 16 and 17, in square 20, (case of Gabarosche,) assessed for $1,000 in 1870, sold for $1,350 in 1837, being over 75 per cent.; one lot, No. 36, in square 54, (case of I. Prosper,) assessed at $400 in 1870, sold for $400 in 1837; one lot, No. 35, in square 54, (case of A. Foucher,) assessed $400 in 1876, sold for $400 in 1837; two lots, Nos. 12 and 13, in square 4, (case of I. Lapene,) purchased for $920 in 1862, sold for $1,150 in 1837, (being 80 per cent.); one lot, No. 29, in square 20, (case of P. Avril,) purchased for $425 in 1862, sold for $600 in 1837, (being over 70 per cent.); two lots, Nos. 1 and 2, in square 57, (case of Bischoff,) purchased for $1,600 in 1861, sold [for] $1,650 in 1837; six lots, Nos. 32, 33, 34, 35, 36, and 37, in square 55, (case of Rousselot,) purchased for $2,150 in 1854, sold for $2,700 in 1837, (being over 70 per cent.); two squares, Nos. 58 and 59, (case of Southern Star Candle Co.,) purchased for $20,000 in 1861, sold for $20,250 in 1837; two lots, 4 and 5, in square 54, (case of Hernandez,) purchased for $950 in 1867, and sold for $850 in 1837. It thus appears that property, not only in the city generally, but also in the Blanc tract, has had a value frequently ranging from 65 and 70 per cent. to the full auction prices of 1837, and in one case even above the auction price." (Pp. 795–6.)

To the report of the Master the defendant made fif-

teen objections before the report was filed (p. 857), which were embodied in a similar number of exceptions after it was filed (pp. 1070–1081).

1. The first exception is that the Master had no right to make or state any account at the present stage of the cause.

The suit was instituted 7th August, 1879; the report was filed 19th March, 1883, after all the evidence in the cause had been adduced. I see no force in the objection.

2. The second exception objects to the report on the ground that the defendant had parted with the possession of the property on the 10th of March, 1837, and therefore no account should have been taken of rents and profits or value for use while the property was in the possession of strangers holding adversely to the City.

This objection involves the liability of the defendant to the complainant for the rents and profits realized by the occupants of the land; it was disposed of on the demurrer, and will be considered when that branch of the case is discussed.

3. The third exception objects to the report because the Master does not give the names of the occupants of the property in the interval between the 10th of March, 1837, and the date of the possession of the defendants named in the bills filed in the Monsseaux and Agnelly cases. During that period the entire tract has been treated by the Master as unimproved, and his report is made up on that basis. It is immaterial who occupied it, if the City is liable to the complainant for the value for use of the land in its unimproved state.

4. The fourth exception objects to the report because the Master did not pass on the the pleas of prescription set up in the answer.

This was no part of the Master's duty under the order of reference; besides, the report did not deprive the defendant of the benefit of the pleas relied on in the answer.

5. The fifth exception objects to the report because the Master did not determine whether the decree in the suit of the complainant against the City of New Orleans, No. 2695, did not conclude and cut off the complainant from setting up any claim for rents and profits growing out of the possession by the defendant at any time of the property described in the bill. In other words, it is contended that the decree in said suit No. 2695 is *res adjudicata* as to the claims set forth in the bill.

It was not the duty of the Master under the order of reference to pass on this defense. Besides, the decree in suit No. 2695, based on the answer filed in that suit, is confined to specific portions of land in the Blanc Tract, which the city admitted were in her possession. Her defense in the suit was that all the residue of the Blanc Tract had passed into the possession of others by sales made to them. The bill in this case makes no claim for rents and revenues of land, which is covered by the decree in that suit. The decree is found at pp. 7400–2. It recites, that whereas it appears by the answer and exhibits that the City had before the filing of the bill sold and disposed of the Blanc Tract, "except the following parcels, which were still claimed and held by the said City at the time of filing said bill, that is to say, all the square comprised between St. Peter street, Hagan avenue, Orleans street, and Lake road, as shown on the sketch annexed to the answer, and on which the draining machine for draining the city is located; and also four other squares comprised between Dupre, Salcedo, St. Ann, and St. Peter streets," &c., it is therefore decreed that the City surrender the same to

the complainant, and do account to the complainant for the rents and profits thereof; and the Master is directed to take an account of the yearly rents and profits of the said portion of said land, *now held* by the defendant from the time it came into the possession of the defendant on 26th September, 1834, and of all other portion or portions of said tract of land set forth in the said answer of the defendant and exhibits thereto annexed, from *the 26th September, 1834, to the days or dates when the City of New Orleans sold or disposed of the same to other parties.*

In this case the Master states in his report that the complainant makes no claim for revenues *prior to the 10th of March, 1837*, the date of the adjudication and sale made by the city, and that the inquiry is not to comprise squares Nos. 33, 34, 41, 42, and 46. These are the five squares covered by the decree in suit No. 2695. (P. 869, and map of Blanchard, p. 688; testimony, p. 1035.) Therefore the decree in suit No. 2695 cannot be pleaded as *res judicata* as to the claim in this suit.

6. The sixth exception objects to the conduct of the Master in adopting the conclusions of himself and Master J. W. Gurley in the reports made by them in suits Nos. 3663 and 6085, called the Monsseaux and Agnelly cases.

Inasmuch as the identical evidence offered in those cases was introduced in this case, and the Master says that upon a full reconsideration of all the cases he can see nothing to alter his judgment nor any change to be made in the five reports not prepared by him, I cannot appreciate the objection of the defendant.

7. The seventh exception objects to the report of the Master—

A. Because he accepted and acted on the reports made by himself and the Master Gurley in said suits

Nos. 3663 and 6085 as to the rents and revenues of the improved property.

B. Because neither the reports nor the evidence nor the decrees in said suits Nos. 3663 and 6085 in any manner affect the defendant.

C. Because the bill in said cases Nos. 3663 and 6085 had been dismissed before decree as to persons holding property in squares 25, 26, 27, 29, 30, and 31; it avers that the dismissal is proved by the record in said causes and by the deposition of J. Q. A. Fellowes, at that time solicitor for the complainant.

D. Because square No. 30 is not within the limits of the Blanc Tract.

E. Because so far as property sold to McDonough in 1848 is concerned, to wit, lots from 1 to 4 and 12 to 15 in square 25, as well as squares 26, 29, 35, 44, 45, 47, and 53, the complainant is concluded and estopped by the decree in suit No. 2695.

F. Because so far as the following property is concerned, to wit, square No. 15 and the lots therein mentioned, and squares Nos. 17, 18, 19, 5, 6, 20, 21, 22, 23, 31, 36, 37, 38, 49, 52, 55, and 57, there was no competent or legal evidence before the Master establishing either the date or duration of any possession thereof, or the quantity of lots, or the portion of the squares improved or unimproved.

G. Because none of the evidence in suits No. 3663 and 6085 nor the reports of the Masters therein should have been considered by the Master in this case, and that in fact it was contradicted by the testimony of Alexander Dimitry and other witnesses named by the counsel in his exception.

H. Because the Master should have reported that the defendant was in no manner chargeable with any amounts found or determined against the defendants in said suits 3663 and 6085 in the absence of any express

subrogation or transfer of the rights of said defendants to the complainant, and that had said subrogation been found the remedy of the complainant was a suit at law.

I will consider these objections in their order, first, however, calling the attention of the Court to the fact that there is no objection whatever of a specific character to the report of the Master as to the following squares, all of which are unimproved property, to wit: Square No. 3, reported on p. 881; square 4, p. 882; square 7, p. 890; square 16, p. 893; square 24, p. 922; square 32, p. 928; square 35, p. 928; square 39, p. 943; square 40, p. 944; squares 43, 44, and 45, pp. 944–5; square 47, p. 945; squares 50 and 51, pp. 949–50; squares 53 and 54, pp. 954–8; squares 58, 59, 60, 61, 62, 63, and 64, pp. 972–8. And the rents and value for use of these squares as reported by the Master amount to $527,776.20.

I would further remark that this exception objects to the Master's report, on the ground that *no evidence whatever* was offered in this cause to establish the rents and revenues and value for use of the various lots and squares in the Blanc Tract other than the depositions filed in suits Nos. 3663 and 6085.

This is not the fact. The main witnesses on the subject of rents and revenues in suits Nos. 3663 and 6085 were two experts employed by the complainant to examine the property. Those two witnesses, Messrs. E. A. Deslonde and J. W. Davis were re-examined in this cause, and, after having read over their testimony given in said suits, reaffirmed it as their testimony in this cause. (See agreement of counsel as to Deslonde & Davis, p. 83, and their re-examination, p. 551.)

Again, the complainant introduced in this cause the bill, answers, decrees, reports of the Masters, and the

testimony adduced by the complainant before the Masters in said suits Nos. 3663 and 6085 (p. 68 and 70.)

This was objected to as *res inter alios acta*, but the defendant waived its objection at a subsequent stage of the cause by the introduction of "all the record and evidence prior to the hearing in the cases No. 3663 and No. 6085 of the docket of this Court, referred to in the bill not already offered by complainants, so as to make the record in each complete (p. 688.) Respondent also offered in evidence the entire record in the suit of Whitney *v.* Relf, No. 122, also the entire record in the suit of Gaines *v.* New Orleans, No. 2695, and the entire record of the suit of the City of Baltimore *v.* New Orleans, No. 8535; though the complainant objected to the records Nos. 122 and 2695 as a useless and impertinent extension of the evidence in this case beyond any possible bounds of an examinable transcript (p. 849.) I do not find in this record any motion on the part of the defendant to suppress any testimony or evidence offered by the complainant. Under these circumstances it cannot be earnestly contended that there was no competent evidence before the Master to enable him to ascertain what portion of the land was occupied and what portion was vacant, and to determine the amount of revenues derived or derivable from the property.

Hence, there is nothing in the objections mentioned under the head of letters F and G, for it is not stated in the objection lettered G in what respect the testimony of Dimitry and others conflicts with or disproves the testimony acted on by the Master. I understand the rule to be that objections to a Master's report must not be general, and the duty of the party making objections is not only to point out the particular testimony on which he relies, but also to state in what respect the testimony

relied on conflicts with the facts reported by the Master.

Story *v.* Livingston, 13 Pet., 359.
Stanton *v.* Railroad, 2 Woods, 506.
O'Reilly *v.* Brady, 23 Ala., 530.
Wilkes *v.* Rogers, 6 John., 566.
Dexter *v.* Arnold, 2 Sumner, 108.
White *v.* Hampton, 10 Iowa, 238.
Holcombe *v.* Holcombe, 3 Stockton, 281.
11 Wheat., 127.

A and B. These objections will be considered together. Our contention is not only that the reports of the Master and the decrees rendered thereon in suits 3663 and 6085 are evidence in this cause, but that they are conclusive against the defendant.

The defendants in those suits were purchasers from the City of New Orleans or its vendees; the City was the warrantor of the title of those defendants, and as such was ultimately liable to them for any rents or profits or values for use which they might be compelled to pay to the complainant as real owner. The evidence shows that the City not only had notice of those suits, but actually employed counsel to aid the defendants in conducting their defense.

The testimony of Mr. McConnell shows, that under his contract with the City of New Orleans he was bound to defend any of the defendants in suits Nos. 3663 and 6085 who called on him to do so if they claimed title from the City; that he was actually employed by some of them; that he was not paid for his services by any of the defendants represented by him, because he acted under his engagement to the City; and that in his opinion the judgment against the parties represented by him, where their title came through the City, would bind the City as warrantor without further litigation. (P. 661.)

He further stated before the Master, in suit No. 6085, when the case of Abadie was under consideration, "In this case, as in every case where the City of New Orleans is liable to be called on as warrantor, I decline to represent them unless they have counsel to assist. I will aid and assist them, but I will not represent them. Mr. Abadie I have not been able to find." (P. 5969, Vol. 6.) He, however, protested against going on with the examination of Abadie's case, on the ground that Abadie was not personally served, nor was he represented by counsel. He said, "I make this protest as *amicus curiæ*"; and at his instance the case was continued till the following Monday. (P. 5970, Vol. 6.)

The contract of the City of New Orleans with Messrs. Taylor & McConnell, entered into 12th February, 1866, declares that in consideration of the payment hereinafter mentioned, they bind themselves to give their professional services on behalf of the City of New Orleans in all suits instituted by Myra Clark Gaines, wherein the City stands in the relation of warrantor of the defendants or as a party." (P. 109.)

Again, in 1874, Mr. Taylor having died, a resolution was passed by the City of New Orleans declaring that "J. McConnell is hereby continued as special counsel to defend the interests of the City of New Orleans in the Gaines cases," &c. (P. 112.)

In 1878, another resolution appropriated $2,500 to the payment of James McConnell on account of services rendered in the Gaines cases. (P. 114).

The letter of Mr. McConnell to the Mayor, dated June 22, 1878, reports to the City of New Orleans the condition of the litigation in the suits 3663 and 6085; he informs the city authorities of the efforts of Mrs. Gaines to obtain judgments for rents and revenues against the defendants in these suits; that the Master had made reports; that exceptions to the Master's re-

ports will be prepared and filed in behalf of numerous defendants; that the question involved is one of vast moment to the City, and that about one hundred and eighty persons, who purchased from the City, had been sued by Mrs. Gaines. He then expresses the opinion that these persons may be divided into three classes, about equal in number, as far as he can ascertain: 1st, Those who have defended the suits; 2d, Those who, although cited, have made no defense; 3d, Those who are named defendants in the bill, but have not been cited. He then says, the liability of the City to the first class is not doubtful except as to the amounts; the liability of the City to the second class is doubtful, because they have taken no steps to defend themselves; but as to the third class, there is no liability, because they have not been cited up to this date, "and now their defense by prescription, when sued, would be perfect." (P. 116–118.)

Our contention is that the decrees in said suits Nos. 3663 and 6085 are conclusive against the defendants in this cause, and that they are not subject to re-examination. That they are final decrees against the defendants in those suits will not be questioned. If so, they are by the law of Louisiana final against the warrantor.

It is true that in the tenth exception (p. 1079), the defendant assails some of the decrees on the ground that in many instances the subpœnas were served upon persons who never had possession of any property in the Blanc tract, and that in others, decrees were rendered against persons who had not been served, or who had died before suit, or before decree, but no specification whatever is made of any case or instance wherein a decree was rendered without service of process, and, in fact, the exception complains that the Master did not report what judgments or decrees were void for the reasons stated. The exception refers to the deposition

of J. Q. A. Fellowes, but such a general reference is entirely unsatisfactory because of its vagueness, and imposes on the Court the labor of going through each case to ascertain, first, whether the subpœna was served, and, secondly, if not served in the year 1871, the time to which the witness refers when he testifies that he examined the returns of the marshal on the subpœnas, whether subpœnas were, or were not, issued and served in the interval between the year 1871 and the year 1877, when the decrees were rendered (p. 665), and, thirdly, whether or not the defendant did not appear at some stage of that cause. It was the duty of the defendant in its exception to the Master's report, to enumerate the cases and designate the defendants against whom decrees had been rendered without service of process, if there had been any. Besides, the oral testimony of a witness who examined the subpœnas in 1871, is not sufficient to invalidate a decree, when the record is the best evidence whether or not a defendant was served with process, especially as the defendant may have voluntarily appeared, or may have in some mode recognized the validity of the *pro confesso* entered against him, or acquiesced in the validity of the decree. Take, for instance, the case of Mrs. Ellen Phillips: Mr. Fellowes testifies that his examination in 1871 satisfied him that Mr. Wilder, who had entered her in his book as one of the defendants served with process, had committed an error, and he had erased her name, (p. 664); yet the record shows that she recognized the validity of the decree rendered against her, by making a compromise with Mrs. Gaines on 29th June, 1879, (p. 691).

So Mr. Fellowes says that J. P. Seffrent was entered by Mr. Wilder as served with process, and he had erased the entry as an error. He further says that the name should be Leffrent, instead of Seffrent (p. 694). Yet the record shows that Jean Pierre Seffrent appeared

before the Master, and testified that he purchased the property mentioned in the decree against him in 1851, and held it until January, 1878 (p. 5063, vol. 5). Mr. Fellowes says the same error was committed as to widow Laurens and B. Morere (pp. 664–5); yet both of them compromised with Mrs. Gaines in 1879, after decrees against them (pp. 693 and 697). So Mr. Fellowes says widow J. B. Marmouget was not served; that he does not find in his book the name of Marmouget, but Marmsole; that Marmsole owned square 19, Blanc Tract (p. 669); yet we find that the widow Marmouget compromised the decree against her. The compromise embraces lots 2, 4, 5, and 6, in square 19 (pp. 689–90). Arthur DeJean is put down in the list of Mr. Fellowes as a defendant upon whom process was not served (p. 758); Wilder says the reverse (p. 577). The record shows that he appeared before the Master and presented his accounts for buildings and expenses (p. 6167, vol. 6). Mr. Fellowes states that the property for which George B. Eberling was sued was not a part of the Blanc Tract; that property was in square 25, bounded by Lopez, Salcedo, Dumaine, and St. Ann streets (p. 669). Eberling appeared before the Master, and set up a claim for taxes and improvements on lots 1, 2, and 3, in said square (p. 5950). He did not dispute the fact that it was a part of the Blanc Tract, and the defendant in this case makes no exception on that ground; indeed, his exception that square No. 30 is not in the Blanc Tract, is an admission that all the other lots and squares not excepted to on that ground constitute part of that tract.

I have taken some trouble to look into the record for the purpose of ascertaining whether or not the decrees for improved property reported by the Master, and enumerated in his report at pages 870, 871, and 872, were rendered without notice to the defendants. The following is the result :

Pelhofer was duly cited (p. 2225), and he appeared before the Master and testified.

Rillieux was cited (p. 2226), and filed exceptions (p. 4360), and appeared before the Master (p. 2319.)

Randon, F., was cited and compromised with Mrs. Gaines after decree (p. 688.)

Jessum was cited and testified before the Master (p. 4574.)

J. Bermudez was cited and filed answer (p. 2727.)

Goudrain, J. V., was cited and filed exceptions (p. 4771.)

Fuentes, J., was cited and filed answer (p. 2521.)

Pecora, M. E.; the subpœna is missing, but Fellowes' memorandum shows this defendant was served with process (p. 751); *pro confesso* entered (p. 6170.)

Dunand. The decree in this case refers to two lots in square 36. The memorandum of Fellowes shows service on Dumond (p. 737), that of Wilder on Dunand (p. 577.)

Caps, widow, P. She was served with process (p. 2246.)

Nunan, John. Wilder says he was served (p. 580), so does Fellowes (p. 748.)

McCarty, D. B., was served and appeared (p. 2319.)

Phillips, Ellen, compromised after decree (p. 689.)

Muller, Peter, was served (p. 2263.)

Desplaux, J., was served (p. 2261–2.)

Aron, L., was served (p. 2261.)

F. Ney or Nye. Wilder's memorandum shows service on him (p. 580), so does that of Fellowes (p. 749); certain it is he was notified to appear before the Master (p. 5155.)

Lohr, Geo., was served and appeared (p. 2319.)

Beers, James, was served and appeared before the Master and filed his account (p. 6102.)

Carlon or Caxlon, A. Wilder's memorandum shows

service of process (p. 576); so does that of Fellowes (p. 736.)

Dejean, A. Fellowes' memorandum says he was not served; Wilder's shows that he was served; he appeared before the Master and filed an account (p. 6163.)

Oechner, D., was served and filed answer (p. 2676.)

Seffrent, J. P. Mr. Fellowes says he was not served; Wilder's memorandum shows that he was (p. 589.) He appeared before the Master and claimed improvements (p. 5063.)

Muller, widow Jacques. Both Wilder and Fellowes agree that she was served (Wilder, p. 580; Fellowes, p. 748).

Dorocher, widow. Wilder's memorandum shows she was served (p. 585); the actual possessor of the property appeared before the Master, stating he had purchased from her *pendente lite* in 1876; the bill was filed in 1865.

Dongel or Donzel. He was served (p. 2237); reported as served in Fellowes' list under the name of Danzel or Donzel, but the property claimed by him identifies the party. The decree is in regard to lots in squares 55 and 56, and the report of Fellowes shows the same property (p. 736).

Larquie, H. He was served (p. 2319).

Muller, M. He was served (p. 2393), and testified before the Master as to improvements, &c. (p. 4527).

Rousselot. Served and filed exceptions (p. 5903).

Despeau, J. Served; filed answer (p. 736), and compromised after decree (p. 689).

Blackschmidt. Served (p. 2238); testified before the Master (p. 4594).

Abadie, Jos. Served and appeared (p. 2319).

Graff, M. Served and appeared (p. 2319).

Laburthe, or Labat. Served, as shown by memoran-

dum of Wilder (p. 579) and Fellowes (p. 745); writ of possession issued and executed (p. 6039).

Parocel, Etienne. Served (p. 2241); filed answer (p. 2377); so reported by Wilder (p. 588).

Bischoff, Geo. Served and appeared (p. 2319).

Zimmerman. Served; testified before the Master (p. 3884) and compromised after decree (p. 689).

Bordes, P. Served as reported in memorandum of Fellowes (p. 733) and Wilder (p. 575); this defendant compromised after decree (p. 688).

Alome, Caroline. Evidence was offered on her behalf before the Master (pp. 6108–9); she compromised after decree (p. 688).

De Lord, Mrs. S. Served (p. 2281) and appeared (p. 2319), and compromised after decree (p. 688).

Mainville, P. Served and filed answer (p. 2696).

Morere, B. Mr. Fellowes thinks he was not served (p. 665); Wilder reports that he was (p. 580.) His widow compromised with Mrs. Gaines after decree (p. 689).

Bazac, Jean. Filed answer (p. 2825).

Lavie, Jean. The best evidence that he was served is the fact that a *fi. fa.* for $130 costs was issued against him and he paid the amount. See *fi. fa.* and return (p. 6189).

Jacquet. He was served (p. 2251); his widow compromised after decree (p. 689).

Foy, F. Was served and appeared (p. 2319).

Marmouget, Mrs. J. B. Mr. Fellowes has this name on his list—Mrs. J. B. Marmosolle and husband—and places her property in square 19. He says she was not served (p. 746). He reports this in his testimony (p. 664); Wilder on his list writes the name J. B. Marmoset and husband (p. 587), and enters them as served.

This entry is correct, because the record shows that widow J. B. Marmouget appeared before the Master

and testified as to the improvements on her property, lots 3, 4, 5 and 6, in square 19 (p. 4973). She compromised after decree (p. 689).

Lanusse, A. Was served and filed answer (p. 2545.)

Bermond, J. Was served, and the record shows a motion for injunction for him and many others through Mr. McConnell (p. 5643–4).

Carrière, H. Compromised after decree (p. 688).

Dougherty heirs. Owen Dougherty appeared (p. 2319).

Ledoe, Mrs. J. Filed answer (p. 2378) and exceptions (p. 4864).

Villars, Nancy. Served and appeared (p. 2319).

Moran, widow. Was personally notified by the Master to appear before him (p. 5000).

There are but five cases where decrees for improved property were rendered not included in the above list of cases. They are—

Mrs. J. Deloc	$3,166
P. Lamartire	1,348
Mrs. C. Ravanet	1,833
Mrs. McLauglin	1,599
Mrs. J. Bossart	1,605
	$6,385

If these cases had been specifically called to the attention of the Master he might have ascertained whether or not they were served with process, but neither the objection before the Master nor the exception to the Master's report, nor the answer, designates any particular cases wherein judgment was improperly rendered.

I shall, therefore, assume the Master's report to be correct, that decrees have been rendered in suits Nos. 3663 and 6085 for the revenues of all the improved property amounting to $197,660, exclusive of interest. The value for use of unimproved property is found by the Master to be the sum of $627,000.12 exclusive of

interest, a very large proportion of which is covered by decrees rendered in ninety-four cases of possessors of vacant property embraced in said suits Nos. 3663 and 6085. (P. 876).

The report of the Master is not objected to on the ground of his allowance of interest on the annual rents at five per cent. per annum, and if it were, this Court has decided that question in Gaines *v.* New Orleans, 15 Weaver, p. 624. But, as I have said, the question of interest is not before the Court, because no exception to the report of the Master makes the objection. Therefore the total principal and interest reported by the Master to be due, namely, $1,622,061.70, of which $824,660.12 is principal, and $797,401.58 is interest, is entirely covered by decrees as to the improved property, and is to a very large extent covered by decrees as to the unimproved property. The total amount of decrees in said suits is $576,707.72; but the sum of $1,045,363.78 is not covered by decrees. Our contention is that those decrees are conclusive on the defendants in those suits, and if so, they are conclusive on the City of New Orleans, who is the ultimate warrantor.

I have already shown that the City of New Orleans not only was aware of those suits, but actively engaged in defending them. If Mrs. Gaines could enforce those decrees against the defendants in those suits, they in turn could recover similar amounts from the City as warrantor, and the decrees in those suits would be conclusive on the City, because she had notice thereof, and either defended them or could have done so. The defendant does not pretend that those defendants could have successfully defended those suits; the fact is, as I have said, the City undertook, through her counsel, Mr. McConnell and Mr. Taylor, to manage the defense, and actually did so, for some of the defendants, and the counsel were bound to defend all of them by the terms

of the contract entered into on February 12th, 1866. (P. 109.) The City stood in the relation of warrantor to all the purchasers of that portion of the Blanc Tract which Blanc had acquired from Clark. There was other property included in suits Nos. 3663 and 6085 claimed by Mrs. Gaines and with which the City had no concern.

The liability of the City for those decrees was called to its attention on 20th August, 1877, by Mr. McConnell, who criticises the character of the decrees with some severity, urges the City to appeal, and tells his client "that it is impossible to overestimate the importance of the issue of *good or bad faith* as affecting the liability of the City as warrantor" (p. 711.) Why was this issue so important? If the defendants in those suits were possessors in good faith, they were not responsible for revenues or rents, and therefore the City would not be liable to them; but if they were possessors in bad faith, as the Court had already decreed them to be, then they were responsible for rents and profits to Mrs. Gaines, and the City was liable to indemnify them by virtue of its warranty.

It is provided in the Code of Louisiana, "when there is a promise of warranty, or *when no stipulation was made on that subject*, if the buyer be evicted, he has a right to claim against the seller—

1. The restitution of the price.

2. That of the fruits and revenues, when he is obliged to return them to the owner who evicts him.

3. All the costs occasioned either by the suit in warranty on the part of the buyer or by that brought by the original plaintiff.

4. In fine, the damages, when he has suffered any beside the price that he has paid. (Article 2506.)

"The purchaser threatened with eviction who wishes to preserve his right of warranty against his vendor should notify the latter, in time, of the interference he has experienced.

"The notification is usually given by calling in the vendor to defend the action which has been instituted against the purchaser. (Article 2517.)

"In the absence of this notification, or if it has not been made within due time—that is, in time for the vendor to defend himself—the warranty is lost: *Provided, however*, That the vendor shall show that he possessed proofs which would have occasioned the rejection of the demand, and which have not been employed because he was not summoned in time." (Article 2519.)

The Code of Practice contains similar provisions. Article 714 declares that "the purchaser shall even lose the redress granted by the two preceding articles if an action is instituted against him for the purpose of evicting him, and he neglects to give notice of it to the party from whom the property was seized, provided this party possessed the means of repelling the demand if informed of its having been made."

When the warrantor is cited by the purchaser to defend the suit he is bound to assume the defense thereof, and in that case "if the defendant is cast in the action, the judge, when he gives judgment against such defendant, must render at the same time a judgment in favor of the defendant against his warrantor for whatever indemnity may be due to such defendant, as well as for all the loss and damage he may sustain by reason of the action." (Code of Practice, Art. 385.) See also Art. 388, C. P., which is similar to Arts. 2517–18 of the Civil Code. It was settled as early as Castellano *v.* Peillon (2 Martin, N. S.) that judgment against the vendee bound the vendor to make good his warranty unless he could prove that the judgment was obtained by fraud or collusion, or that matters of defense which he could have used were not employed at the trial.

It is not sufficient for the vendor who is not called in warranty, or has not been notified, to show *error* in

the judgment; he must show that he could have adduced new facts or made peremptory exceptions which, if presented, would have produced a different result. (Rives *v.* Henstock, 2 R., 187.) The judgment against the vendee is conclusive against the vendor when he has had notice, although he does not appear and defend the suit. (Vienne *v.* Harris, 14 La. An., 382; Late *v.* Armorer, 14 La. An., 826; Johnson *v.* Wild, 8 La. An., 129; Williams *v.* Le Blanc., 14 La. An., 757.)

In Late *v.* Armorer (14 La. An., 826) the record contained a bill of exceptions to the admissibility in evidence *as to the warrantor* of some testimony taken by commission *previous* to his being made a party to the suit. The Court say: "Had this suit been decided in the absence of the warrantor the judgment would have been binding upon him, unless he could have shown that he possessed proof which could have occasioned the rejection of the demand, and which had not been employed (C. C., 2494). But, although regularly summoned by the defendant and present in court by his answer to the call in warranty, he has suggested no facts or means of defense of which the defendant might have availed himself in this controversy. The evidence objected to by him, he admits to be good to make out a case against the defendant; *if so, the judgment upon such evidence is binding upon himself* unless he can make out a case under Arts. 2493 and 2494 of the Civil Code." These Articles—2493 and 2494 of the Old Code—are Articles 2517 and 2518 of the Revised Code of 1870.

In Kling *v.* Sejour (4 La. An., p. 134) the Court say "The provision of the Code, Arts. 2493 and 2494, which binds the vendor by a judgment of eviction against the purchaser, even in the absence of a notification of the suit, unless the vendor shows that he possessed proofs which would have maintained his title,

and which for want of notification of the suit to him have not been made available, has no application to this case. The judgment referred to is a judgment in a petitory action which is conclusive as to the rights of the parties. An action of ejectment is for the recovery of land, but a judgment in it is not conclusive as to the right. The action may be renewed by either party or the right may be again tested in another form. At all events, an inquiry as to the application of our laws to this case would be entirely superfluous." The suit in the case concerned land in Mississippi which had been sold by contract made in Louisiana; the Court held that the laws of Mississippi applied to the contract.

It is well settled that fruits and revenues belong to the owner by *right of accession*. Mr. Justice Bradley, in the case of Gaines *v.* New Orleans, 1 Woods, 105, said: "The possessors being in bad faith, I think, by the law of Louisiana, they cannot claim the benefit of prescription with regard to rents and profits any more than with regard to the land itself. There are reported decisions to this effect, some of which are referred to—(2 Hennen's Dig., Tit. Possession, II a, p. 1195, No. 5); and Toullier says: "Bad faith renders him, the possessor, liable to account for not only the fruits which he has received, but even those which he might have received, and which have perished by his negligence; and this obligation is extinguished only by the prescription of the thing itself, and restitution is due from the day when the bad faith commenced." (Droit Civilé Française, vol. 3, pp. 71 and 72.) This doctrine was affirmed by this Court, on appeal, in 15th Wallace. Mr. Justice Hunt, in speaking of prescription of rents and profits, said: "It is controlled rather by *the title of the right of accession to what is produced of the thing*." Civil Code, Art. 490–484.

Duranton says, "that the warranty of the vendor ex-

tends not only to such fruits and revenues as the buyer actually received, but such as he neglects to receive, and which the proprietor might have received." (Vol. 16, No. 288.)

Pothier says: "The seller who does not defend the buyer, or who fails in the defense which he undertakes, ought to be condemned in case of eviction—1. To the restitution of the price; 2. To *acquit the buyer from the judgments in favor of the original demander* for a restitution of the fruits, or on account of the degradation committed upon the estate; 3. To acquit the buyer from the expenses; 4. To pay the buyer the damages resulting from the eviction over and above the price." (Cushing's Translation Pothier on Sale, pp. 70 and 71.)

The seller, by virtue of his warranty, is bound to acquit the buyer who commits waste, from condemnation on account of such waste, although the buyer at the time knows that he is not the owner of the estate; for, says Pothier, "the seller cannot reproach him with these acts. He has a right in doing them to rely upon the seller's warranty, and that the seller will prevent an eviction, *as he is bound to do, by purchasing the estate of the proprietor.*" (Idem, No. 128.)

It is therefore clear that judgment against the purchaser is binding on the warrantor or vendor, especially if he has notice of the suit, not only as to title to the land, but as to the rents and revenues, or value for use, which the owner recovers against the purchaser in the eviction suit.

The defendant, therefore, cannot now question in this case the decrees rendered in suits Nos. 3663 and 6085 as to any matters there decided, either as to title or rents and profits, or value for use allowed to Mrs. Gaines by those decrees. Whether Mrs. Gaines can compel the defendant to pay to her the amounts mentioned in the decrees is a matter to be hereafter discussed when we come to the demurrer.

C.—This objection asserts that the bills in said suits, 3663 and 6085, were dismissed as to persons holding property in squares 25, 26, 27, 29, 30 and 31, and also that square No. 30 is not in the Blanc Tract. This square 30 is the only one excepted to on the ground that it is no part of the property of Mrs. Gaines.

The answer to this objection is that the record does not sustain the averment. The Master reports that only four-fifths of square 26, one-fifth of square 27, and one-half of square 29, and 20 lots in square 30 are claimed by Mrs. Gaines. Four lots in square 31 are improved; sixteen lots in said square unimproved, (p. 925–7). The objection refers to no evidence to support the averments therein except the deposition of Mr. Fellowes. It asserts that the record will show that the suits were dismissed as to the squares in question. The dismissal of a suit is evidenced by the record thereof; the oral testimony of Mr. Fellowes goes for naught. The exceptor has not pointed out what part of the record shows the dismissal of the suits as to the squares mentioned. Mr. Fellowes says he discontinued these suits as to squares 25, 26, 27, 29, 30 and 31 in September, 1871, on the strength of a plat which he had prepared of the Blanc Tract (p. 672).

The map prepared by Gen'l Blanchard, a witness for the defendant in this cause, shows all these squares to be in the Blanc Tract to the extent reported by the Master (p. 688). The defendant seems to have acquiesced in this map except as to square 30, and for what reason he questions that square I cannot imagine.

I have carefully examined the discontinuances entered of record, and I can find none as to lots in squares 26, 27, and 29 and 30. I do find discontinuances in the case against Douvillier, which embraced lots 1 to 5 in square 25 (p. 5250); in the case against widow Alex. Lamy, which embraced lots 5 to 10 in square 25 (p. 5251),

and in the case against A. Rancour, which embraced lots 1, 2, 3 and 4, in square 31. (P. 5642, vol. 6.) If there be any other discontinuances as to property in the squares named by Mr. Fellowes and specified in the objection, to wit, squares 25, 26, 27, 29, 30 and 31, I have not been able to discover them, and I therefore deny that any such exist.

D.—This objection asserts that square 30 is not within the limits of the Blanc Tract. I deny the averment, and refer to Blanchard's map adduced by the defendant (p. 688).

E.—This objection avers that the decree in suit No. 2695 precludes the complainant from claiming rents and profits on the property sold to McDonough in 1848. The Master confines this claim to the period from 1837 to date of sale in 1848 (p. 870). My answer is that the decree in suit 2695 does not embrace this property.

F and G.—These objections present the question whether the evidence adduced in suits 3663 and 6085, and the reports of the Masters in these cases, should have been received and considered by the Master in this case; for that evidence and those reports showed when the possession of the various owners commenced and what parts of the property were improved. The residue was treated by the Master as unimproved, and he so states in his report. The defendant, as I have shown, offered this same evidence, and cannot now object to it. Besides, no motion was made to suppress it. The decrees in these cases being conclusive on the defendant, they of themselves establish the dates of the possession of the respective defendants in those suits, and the amounts of rents and revenues claimed on account of such possession.

H.—This objection raises the question of the legal liability of the defendant for the amount of the decrees

recovered in suits Nos. 3663 and 6085. It was no part of the duty of the Master to decide that question, and finds no place in an exception to his report. I will consider it when I come to the demurrer.

Eighth Exception.—This exception avers that the evidence shows the defendant had parted with the possession of all property embraced in the Master's report on 10th March, 1837, and that the City ceased to hold possession of any part thereof in the interval of time between the 10th March, 1837, and the dates when the respective defendants in suits 3663 and 6085 took possession, and that there is no evidence to show that during the period mentioned any rents and profits accrued to any one possessing, or claiming to possess, the property, and in this respect the report is conjectural.

The report treats all the property as vacant in the interval between 1837 and the dates of the possession of the respective defendants in said suits. It proceeds upon the principle that whoever possessed could have derived revenue from the property, and therefore the City, as warrantor of those persons, is liable in equity to the complainant for such revenues as she might have derived from the property had she not been interfered with by the defendant and her vendees. So far as legal liability to the complainant is concerned, this is not the proper place to discuss it. So far as concerns the principles on which the Master estimated the value for use of the vacant property, I submit the objection on the Master's statement of the evidence and his conclusions as set forth in his report in the case No. 3663, found at pages 765–796. I will revert to this hereafter. I observe, now, that the principle adopted by the Master in treating the possessors, and especially the City, as a possessor in bad faith, was adopted by Mr. Justice Bradley in the case of Gaines *v.* New Orleans, p. 719. This

Court so held in Gaines *v.* Hennen, 24th Howard, and again in Gaines *v.* New Orleans, 6th Wallace. I do not consider the question open to discussion after the decision in Gaines *v.* New Orleans, 15 Wall., 620. As to the principle on which the Master's account is stated, the Court below said:

"The Master's account is stated in the precise manner determined to be correct in the case of Gaines *v.* New Orleans, 15 Wallace, 634; that is, he has stated the account with reference to each lot separately, and has ascertained the rent or income which should have been derived each year, and has computed interest at five per cent. upon the same down to 10th Jan'y, 1881, which point of time he selected for convenience. The Master's account shows that the total amount of judgments rendered against the warrantees of the defendant in the Agnelly & Monsseaux suits is $576,707.72. This amount, though less than the evidence shows is requisite to indemnify the complainant, cannot be disturbed. It is to the extent of the periods covered thereby binding alike upon the defendant and the complainant. A study of his report and the records of the causes introduced in evidence shows, that when the complainant recovered the land, she recovered rents for only a portion of her dispossession, often a small one, as the tenants had been in occupation only varying fractions of time since 1837. The proof shows that the earlier intermediate grantees who occupied it are either insolvent, dead, or, after search, cannot be found. The balance of the amount, viz., $1,045,363.78, which is the aggregate of the rents and profits which would with ordinary good management have been received from the unimproved lots—*i. e.*, for those periods not covered by the possessory judgments—is derived from a detailed statement of the rents of each lot, the yearly rental being five per cent. on seventy per cent. of the price of adjudication in 1837. This rate, according to the conclusion of the Court as above stated, is short of what the evidence shows is the true measure of the rent by thirty per cent., *i. e.*, that the yearly rent, as established by the evidence, is five per cent. upon one hundred per cent. of the full price of adjudication and

sale. The correction required is made by adding thirty per cent. of this sum where, as has been said, the computation has been made on the basis of seventy per cent. The amount to be recovered, therefore, would be as follows:

For improved and unimproved land already in judgments.....	$576,707 92
For balance of rents unimproved land..	1,348,959 91
Total.....	$1,925,667 83

"For which last amount and the costs which have been taxed in the Agnelly and Monsseaux suits, with interest upon that portion which arises from the use of sums for rent from 10th January, 1881, the complainant must have a decree."

Ninth Exception.—This exception complains that the Master adopted 70 per cent. of the prices realized at the sales of 1837 as the basis of value upon which he estimated revenue. I rely on the conclusions arrived at by the Master, and his synopsis of the testimony, as an answer to this exception.

Tenth Exception.—This exception is but a reiteration of objections already discussed. It alleges that the decrees in suits 3663 and 6085 "*were to a great extent null and void.*" There is no specification of the decrees so affected, nor how many; nor does it state the amounts of the decrees nor the persons against whom the decrees were rendered. It further avers that a large number of the defendants in those suits died before suit was brought; there is no specification of the suits or of the defendants. It further avers that *pro-confesso* decrees were entered against defendants not served with process; the exception does not specify the defendants or the decrees. It then reiterates that the bill was dismissed as to squares Nos. 25, 26, 27, 29, 30, and 31. The fact is, I have disposed of all these objections in

considering the various subdivisions of the seventh exception.

Eleventh Exception.—This exception refers to a matter of practice not worth discussion, especially as the reports had been offered in evidence and were part of the record.

Twelfth Exception.—This is but a reiteration of the objection that seventy per cent. of the amount realized at the sales of 1837 is not a fair estimate of the value of the land. It requires no further notice.

Thirteenth Exception.—This is but a reiteration of the twelfth exception in another form. It avers that the Master disregarded all the testimony in the case when he adopted seventy per cent. of the prices realized in 1837 as the basis of value. This exception does not refer to any specific witness or testimony. The Master's report shows that he did not disregard the testimony; on the contrary, he gives a full account of it, and then concludes that other facts in evidence outweigh it.

Fourteenth Exception.—I do not comprehend this exception in so far as it refers to an account against Avegno for revenues for four-fifths of square 26 and one-fifth of square 27. I can find no such account against Avegno. The property he held is described in his answer, page 2218. As to square 26, the rents and revenues are estimated from 10th March, 1837, till it was sold to McDonough in 1848. (P. 925.)

There is no evidence that the bill in suits 3663 and 6085 was dismissed as to those squares. It is true Mr. Fellowes so states, but the record does not support his assertion.

Fifteenth Exception.—This is a general exception, in-

volving the whole controversy, and is not entitled to special notice.

Having disposed of the exceptions filed by the defendant to the report of the Master, I will call the attention of the Court to the exceptions filed by the complainant. They were lost or mislaid, but by stipulation of counsel, filed 2 October, 1883, it is agreed that said exceptions were in substance as follows:

"That the Master erred in making, as his basis of calculation for the fruits and revenues and value for use, not covered as to time by the final judgments in cases Nos. 3663 and 6085, five per cent. upon seventy per cent., instead, as he should have done, five per cent. upon the full one hundred per cent. of the prices for which the said squares and lots were adjudicated at the said sale 10th March, 1837." (P. 7543.)

It is also agreed that a similar objection was made by the complainant before the Master to the draft of the Master's report before it was filed by him. (P. 7543.)

The Court considered this objection valid, and accordingly adopted the basis of the prices realized at the sale of 10th March, 1837, except as to the cases covered by decrees in the suits Nos. 3663 and 6085, which were held to be conclusive on both parties.

It is well settled that the Master's report will be accepted, unless there be manifest error in his conclusions. In Donnell *v.* Ins. Co., 2 Sumner, 371, Judge Story held that if the Master's conclusion be one upon which different persons, equally impartial and intelligent, might entertain different opinions, the Court will not reject it, though the Court might have arrived at a different conclusion.

When a matter of fact is referred to a Master depending upon conflicting evidence and the credibility of witnesses, his decision will not be interfered with on his mere judgment of the facts, unless it is a plain case

of error or mistake. (Isard *v.* Bodine, 1 Stockton, 309; Newman *v.* Baxter, 14 Vt., 514; Sparhawk *v.* Wells, 5 Gray, 423.)

Although the evidence be vague and not altogether satisfactory, the report of the Master will be accepted as correct unless his conclusion is entirely unwarranted. (Holmes *v.* Holmes, 3 C. E. Green, 141; Nat. Bk. *v.* Sprague, 8 C. E. Green, 583; Fenner *v.* Agulter, 1 Myl. &. K., 120; 2 Dan'l, Ch. Pr., 1299.)

But the report of the Master is sustained by the law of Louisiana, in allowing as rent or value for use five per cent on the value of the land. The value allowed by him is far from being excessive. The Court correctly increased it to the prices realized at the sales of 1837. It will not do to say that vacant lots are not productive. Our Courts have decided "that real or landed property is always susceptible of producing fruits." (Brother *v.* Cronan, 15 La. An., 256; St. Maxent *v.* Segur, 3 Martin, 374; Duplantier *v.* Pigman, 3 Martin, 244; Caldwell *v.* Creditors, 9 La., 267; Lobdell *v.* Rucker, 13 La. An., 570).

The case in 9 La. arose from the sale of a lot of ground in New Orleans. The Court say: "Inasmuch as the transmission of the property is not perfect until the price is paid, and that the price is composed of the capital and the interest which the law allows in the absence of any convention, such interest represents the fruits of the immovables sold." (3 Martin, 91, 18 Sirey, 2, 223; 16 Duranton, No. 342.)

In Duplantier *v.* Pigman (3 Martin, 244), the Court say: "When the price is owing for land, or for anything which, *from its nature*, may produce fruits or revenues, then interest is recoverable."

Therefore, in the sale of land, nothing being said as to interest, the law requires the purchaser to pay interest on the price, because all land is considered produc-

tive property. Article 2553 of the Civil Code provides that "the buyer owes interest on the price of the sale until the payment of the capital in the three following cases:

"1. If it has been so agreed at the time of the sale.

"2. If the thing sold produces fruits or any other income.

"3. From the date of the sale when the price is then due."

In Lawrence *v.* Municipality No. 2, 12 Rob., 453, the Municipality, without legal authority, had taken possession of a lot of ground belonging to the plaintiff, and converted it to their own and the public use by making it part of a paved street; the plaintiff brought suit to recover its value. The Court held that the owner of land illegally taken for public use may recover its value at the time it was taken, in an action for damages. On the receipt of the damages the property will cease to belong to the plaintiff.

Mrs. Gaines, being owner of the Blanc Tract as now established after years of litigation, could have sued the Municipality in 1837 to recover the then value of this tract, which that Municipality had illegally taken possession of, laid out into streets, squares and lots, and sold at public auction. In such a suit the prices realized at the auction sale would have been the measure of value or of damages. Ought a different rule to be now applied simply because years have been consumed in establishing the title of Mrs. Gaines to the property?

The Master's report being disposed of, I now approach the demurrer and the defenses set up in the answer.

PRESCRIPTION.

1. As prescription is relied on both in the demurrer and in the answer, I will first consider that defense.

The prescription relied on is that of one, three and ten years. It is almost sufficient to say that prescription was set up as a defense to prevent Mrs. Gaines from recovering the property both in Gaines *v.* Hennen, 24 How., and in Gaines *v.* New Orleans, 6 Wall., 717, and in both cases the question was decided adversely to the contention of the defendant. The defendant again set up the same defense in the suit of Mrs. Gaines against her for rents and profits, reported in 15 Wallace, p. 633. It was contended in that case that the claim for mesne profits was limited to three years. The Court say: "There is no article of the Code to which our attention is called which limits this claim to the profits for three years. On the contrary, the rules of the civil law and the general principles of equity jurisprudence hold that there is no such limit." The Court then cites Justinian as saying that the possessor in bad faith "is compellable to account for all the mesne profits, together with the land," and refers to authorities which sustained a similar rule in chancery.

The same question was decided by Mr. Justice Bradley in the same case, reported in 1 Woods, 105. As the decision is so apposite, though previously quoted for another purpose, I repeat the quotation in this connection. He says: "I think by the law of Louisiana they cannot claim the benefit of prescription with regard to rents and profits any more than with regard to the land itself." There are repeated decisions to this effect, some of which are referred to in 2 Hennen's Dig., p. 1195, No. 5. And Toullier says, "bad faith renders him [the possessor] liable to account for not only the fruits which he has received, but even those which he might have received and which have perished by his negligence; *and this obligation is extinguished only* by the prescription of the thing itself, and restitution is due from the day when the bad faith commenced." (Droit Civil Française, vol. 3, p. 71, 72.)

There is no question concerning this doctrine, and the reason on which it rests is, that fruits and revenues are considered part of the land; they belong to the owner by right of accession. (Civil Code, arts. 490–494.)

Laurent agrees with Toullier that the obligation of the possessor in bad faith to restore rents and profits only ceases when the possessor has acquired title to the property by thirty years' prescription. He says it is to the proprietor revindicating the property to whom the fruits are to be restored, and after thirty years the proprietor can no longer revindicate. The fruits, he says, are to be *restored with the thing*, that is to say, by right of accession. And how can the proprietor claim the accessory when he has lost by prescription the principal thing? (6 Laurent, No. 233.) He also says that the special prescription of five years contained in article 2277 of the French Code did not apply to a claim for restoration of fruits and revenues. A similar article is found in the Louisiana Code, which prescribes by three years all claims "for arrearages of rent charges, annuities and alimony, or the price of movables or immovables." (Art. 3538.)

The French writers concur with Laurent in the views expressed by him. (4 Duranton, No. 356; 9 Demolombe, No. 589 [*bis*]; Proudhon du Domaine de Propriété, No. 456.) The Supreme Court of Louisiana has also decided the question in Walling's Heirs *v.* Morefield (33 La. An., 1178.) In that case the Court say:

"As a possessor in bad faith, Morefield is responsible for the rents and revenues of the property from the date of his possession under his purchase; and the right of the lawful owner in a petitory action to claim and recover the rents cannot be bound by the prescription of one or three years, which has been pleaded on appeal by defendant. The prescription of three years, which he invokes, applies to actions on contracts for rent or hire, *but not to the obligation imposed by law on the possessor*

in bad faith to restore to the lawful owner all the revenues of his property, of which he has been deprived during the possession of the defendant, whether the bad faith of the latter be moral or merely legal or constructive."

But this Court, in 15th Wallace, has settled the question against this defendant, and, in so doing, said: "Speaking strictly, there was not *only no cause of action, but no right to the mesne profits until the judgment in the original suit.*"

2. The good faith of the defendant. This defense requires no discussion. The controversy is settled; the defendant can no longer pretend to have been a possessor in good faith.

Gaines *v.* Hennen, 24 How.

Gaines *v.* New Orleans, 6 Wallace, and 15 Wallace.

3. The plea of *res judicata* has been disposed of. The claim for rents and profits in this suit does not embrace the square on which the draining machine was situated, nor the four other squares mentioned in suit No. 2695. The effort before Mr. Justice Bradley to hold the City liable as trustee for *the price of the land* which had been sold is a totally different claim from that sought to be enforced in this suit. According to well-settled principles, the refusal to allow Mrs. Gaines, under the decree in suit No. 2695, to recover the price of the land is no bar to a suit for the revenues of the land. The Court held that Mrs. Gaines could not affirm the sale and recover the price; therefore she remained owner of the land, and as such she brings this suit for the rents and profits thereof during the period she was dispossessed by the City and her vendees. (Gaines *v.* Lizardi and New Orleans, 1 Woods, 57.)

I consider that all of the essential allegations of the bill have been established by the evidence, and therefore a discussion of the questions raised by the demurrer will dispose of the case.

Does the bill set forth a cause of action which can be enforced in equity? There are two branches to the proposition:

1. Does the bill disclose a cause of action?

2. If it does, can a Court of Equity entertain this suit to enforce it?

It seems to me that the second branch of the proposition ought to be disposed of by the suggestion that this is an ancillary suit, similar in nature to the main suits for the recovery of the property. No one disputes the right of Mrs. Gaines to bring her ejectment bill in equity to recover title to the land. On what principle can objection be made to an equity suit to recover the rents and profits which are accessory to the land? Mr. Justice Hunt, in 15th Wallace, said, strictly speaking, there was no cause of action for mesne profits, and no right to the same until judgment is recovered in the original suit. If the original suit for title and for possession is cognizable in equity, why should not the ancillary suit for mesne profits, which the plaintiff claims by right of accession, be also cognizable in equity? The character and complexity of the accounts alone would authorize a suit in equity.

The learned counsel says in his brief, filed in the Mandamus suit, that by "the terms of the bill the City of New Orleans *was out of possession of the estate all the time covered by the decree*, and did not receive any rents or profits to be charged with implied contract to pay over to the complainant. The entire decree is punishment for supposed wrongs, with no gleam of contract."

If, then, the City of New Orleans had been in posses-

sion, and received the rents and profits, it seems to be admitted that an implied contract to pay over to the complainant would have arisen. Indeed, our Courts have so decided. In the case of Gaty *v.* Babers, 32 La. An., 109, the petition alleged that the defendant had taken possession of and carried away machinery worth $2,500, which the plaintiff claimed. The Court say: "We do not view the action as one for the recovery of damages resulting from the commission of an offense, or quasi-offense, but as one based on a quasi-contract for the recovery of the value of the property removed and disposed of by one who is represented as having no authority." The Court proceeded to decide that to such an action the prescription of one year did not apply. That is the prescription applicable to all actions for damages resulting from offenses, or quasi-offenses; in other words, torts.

The civil as well as the common law draws a distinction between actions which survive and those which die with the person, and that distinction aids us in considering the character of the cause of action set forth in the bill. Trover, for instance, is in form an action for a tort; but, in substance, it is an action to try title to property. In Trott's case, Cowper, p. 373, Lord Mansfield said:

"That actions might survive or die with the person on account of the *cause of action*, or on account of the *form of action*. 'Where the cause of action is money due on a contract to be performed, gain or acquisition of the testator by the work, labor, or property of another, or a promise of the testator express or implied.' In such case it survives. 'But where the cause of action is by a tort, (as is said in Sir T. Raymond, 57, Hole *v.* Brandford,) or arises *ex delicto*, supposed to be by *force* and against the king's power, then the action dies—as battery, false imprisonment, trespass, murder, nuisance, obstructing lights, deviating a water-course, escape against the sheriff, and many other cases of like kind.'"

As to those actions which die or survive in respect to the form of the action, he says:

"No action where, in form, the declaration must be *quasi vi et armis et contra pacem*, or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record the cause of action arises *ex delicto*, and all private criminal injuries or wrongs, as well as public crimes, are buried with the offender. But in most, if not in all, cases where trover would lie, another action might be brought against the executor which would answer the purpose. So, if a man take a horse from another and bring him back again, an action of trespass would not lie against an executor, though it would against him; but an action *for the use and hire of a horse* will lie against the executor."

Lord Mansfield then refers to a case in Sir Thomas Raymond, and says: "That was the case of Sir Henry Sherrington, who had cut down trees upon the Queen's land and converted them to his own use in his lifetime. Upon information against his widow, after his decease, Manwood, Justice, said: 'In every case where any price or value is set upon the thing in which the offense is committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only in satisfaction of the injury done, then his executor shall not be liable.' Here, therefore, is a fundamental distinction. If it is a suit of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., then the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, then an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another

man's trees; but for the benefit arising to his testator for the value or sale of the trees, he shall."

It cannot be said that the City realized no benefit or value from the lands sold by her. She received the price, and so long as she could keep the complainant out of possession she could and did retain the price, and was benefited to the extent of the annual interest on the amounts so received. She converted to her own use the lands of the complainant; her vendees went into possession and enjoyed the lands. The City is not responsible to her vendees for interest on the price; the use of the land is deemed an equivalent for interest; if the complainant recovers from the City, directly, the rents and profits, she only recovers an equivalent for the interest on the money which the City has enjoyed for so many years.

An action for mesne profits may be maintained by the owner against any person who is in possession of the land by means of his tenants, or who by *his acts, commands*, or co-operation, aids in the expulsion of the plaintiff and in withholding possession from him. (Chirac *v.* Reinecker, 11 Wheat., 297.)

At the common law the original disseisor only was liable for rents and profits; the feoffee, or those who come in by title, were not made liable until the statute of Gloucester, which was passed in 6 Edward 1. (Emmerson *v.* Thompson, 2 Pick., 490.)

After this statute both the disseisor and his feoffee were liable to the disseisee for rents and profits.

It is a mistake to suppose that the original disseisor got rid of responsibility by selling the property to another person.

The civil law corresponds with the common law on this subject.

Laurent tells us that the Court of Cassation has decided that the possessor in bad faith ought to indem-

nify the proprietor for the privation of the use of his property, and consequently that he ought to render an account not only of the fruits he has received during his own illegal possession, but of all the fruits received by third persons in good faith, to whom he has delivered the thing, and besides that, he ought to account for the fruits received by these third possessors after they had knowledge of the vice of their possession. He says that he agrees with the Court, because the possessor in bad faith ought to completely indemnify the owner, who has been deprived of his property. (6 Laurent, No. 232-3.) Pothier puts several cases in which the vendor is under obligation to restore to the owner the value of the thing sold by him. The first case put is where one sells a movable thing which does not belong to him. In such case Pothier says:

"There is no doubt that by selling and delivering such a thing he commits a theft of it against the owner (Code 7, 26, 1, 17), and consequently he contracts in his favor the obligation which results from that species of offense from which arises the action called *condictio furtiva*, by which the owner has a right to demand a restitution of the thing, or, in default of that, the price."

He then says:

"The second case is when one sells without right, and as a thing belonging to him, an estate or an incorporal thing which he knows belongs to me. In this case he does not, properly speaking, commit a theft *qum furtum non cadat nisi in res mobiles et corporales*, *Arg. D. 47, 2, 25*, but he commits an injustice of a similar character, and as natural equity does not permit any one to make a profit by his own injustice, in case I prefer the price for which the thing is sold to the thing itself, and desist from the exercise of my right to reclaim it, the seller is liable to me, *actione in factum*, to pay me the price, if it is already received, or to substitute me in his rights to recover it of the buyer if it is not already received.

"It is of no consequence whether he who sells as his

own a thing which belongs to me is in possession of it without title or in virtue of a just title; it is of no consequence whether he possesses it by a lucrative or even by an onerous title; and though he purchased it in good faith, he is equally under an obligation to restore it as soon as he has knowledge that it belongs to me. The natural law not only prohibits us from taking, but also from retaining, the property of another; and, therefore, when, instead of restoring it to me, he disposes of it by selling it as his own, though he purchased it in good faith, he does not thereby the less commit a theft, if it is a movable corporeal thing; or if it is an immovable estate, an injustice similar to a theft which imposes upon him all of the obligations above mentioned." (Cushing's Translation of Pothier on Sale, Nos. 272, 273, and 274.

MacKeldey's Handbook of the Roman law informs us—

"That theft (*furtum*) in the sense of the Roman law is any fraudulent deprivation of movable things with the design of acquiring an illegal advantage (*lucri animo*). It consists of an illegal appropriation of another's property, either by taking possession of it or when one is in possession of property, not as owner, but as pawnee or commodatory, designedly changes his former possession into possession as his own property by a unilateral act, *e. g.*, concealment, denial, or embezzlement." (P. 364, section 478, Dropsie's Translation.)

Pothier applies the principle to immovables, and so does Laurent and other French writers. (9 Demolombe, No. 589 (*bis.*); 16 Duranton, No. 397.)

Pothier, in his treatise on Law of Property, says, that every possessor in bad faith is considered to have *impliedly* contracted with the owner to *preserve* the thing for him and to deliver it to him with everything which belonged to it. (Nos. 151, 335, and 336.)

We have seen that the right to fruits is an accessory right, and for that reason a demand for fruits and reve-

nues is not extinguished by prescription until the *bona-fide* possessor has acquired, by the prescription of thirty years, the ownership of the productive thing. In Bisland *v.* Provosty, 14 La. An., 175, the Court say: "The right to recover the value of the services of the slaves is a part of the so-called *omnis causa* of the civilians, and partakes of the nature of the real action which it follows." (C. C., 491; 3 La., 350; 6 Savigny, 246, 251.)

The case in 3 La., 350, Gosslin *v.* Abat, decided that revenues and profits partake of the nature of the capital of which they are gained and are not prescribed, as long as the thing producing them is not lost by prescription.

It therefore follows that Mrs. Gaines could have sued the City for the price realized at the sales of 1837, with interest thereon. She has however obtained judgment for the possession of the principal thing, the lands sold, and this suit is practically for the recovery of the accessory, the fruits, which represent the interest so far as the unimproved lands are concerned, and the actual fruits so far as they have been realized from the improved lands. It is an action arising from what Pothier tells us is the implied obligation of the possessor in bad faith to preserve and deliver the thing with its fruits. In this view the question of warranty is immaterial, because the claim is based on the direct liability of the City to Mrs. Gaines arising out of the sale of the property, in violation of the implied obligation just mentioned. The obligation of the City to indemnify her vendees will be extinguished by payment to Mrs. Gaines; the warranty implied by the law of Louisiana in every sale, unless excluded by express stipulation (and that is not suggested in the answer), binds the City, to hold harmless her vendees against the judgments for fruits recovered against them, and her answer to this suit is, I will not relieve these vendees from the judgments recovered against them, however just they

may be, because they have paid nothing to Mrs. Gaines, and I will not pay Mrs. Gaines, because there is no proof that the persons against whom Mrs. Gaines recovered these judgments, were subrogated to the warranty I gave to my original vendees. In this mode the City unjustly succeeds, if her position be sustained, in retaining the money she realized from the sale of the property, with the interest thereon for fifty years, in the face of an undoubted liability to respond for the price of the lands and the fruits thereof. In some instances, the titles of the defendants in suits No. 3663 and 6085 have been traced back to the City, and all the acts of sale contain a subrogation of warranty; in other instances judgments have been recovered against the original vendees of the City. The fact is, that throughout this long litigation it has been assumed on all hands, that the City was liable to the evicted parties as ultimate warrantor, as the invariable practice is for every vendor to transfer to his vendee the right of warranty, which he has against his author, the object being to give the last vendee a direct right of recourse against the remote vendor, instead of the circuitous one through the intermediate vendors.

If there be no subrogation of warranty, the evicted vendee recovers from his vendor, and this vendor from his vendor, and so on until the ultimate vendor is reached. But when the last vendee is evicted, any prior vendee can at once sue his vendor on the warranty contained in the act of sale between them, because he has an interest to relieve himself from liability on his warranty to his vendee. For instance, A sells to B, and B sells to C, and C to D. As soon as D is evicted, B may sue A on his warranty, because B has an interest to relieve himself from liability to C, who is liable to D, the evicted party.

Pothier says: "To entitle the buyer to his action of warranty, it is immaterial whether he himself or his

successors in the thing suffers the eviction; and, therefore, if I sell you an estate which you resell to Peter, and Peter suffers an eviction of it, you are entitled to an action of warranty against me in the same manner as if you yourself suffer the eviction, for I sell the estate to you and to all having your rights—*ayans cause*—I am bound to cause you and those having your rights—*ayans cause*—to enjoy it, and you are interested that I shall defend Peter against the eviction which you are yourself bound to warrant him. (Cushing's Translation, Pothier on Sale, No. 98.) The Supreme Court of Louisiana has accepted this view.

In Goodwin *v.* Chesnau (3 Martin N. S., 409), the Court say: "And this exception brings us to an exception made in the early stage of the proceedings, that the plaintiff had no cause of action, the right being vested in Sadler, the vendee of the plaintiff, who was evicted by the judgment which has given rise to this action. The only ground which the Court can imagine this exception to rest on is that as the plaintiff has not shown that he *has paid* Sadler, he has suffered as yet no damage from the eviction of which he complains; or, in other words, that no cause of action arises in favor of the first vendee by the person to whom he sold being evicted, until it is shown the latter has exercised his action of warranty and recovered. * * * By the warranty, the vendor contracted not only that the vendee should not be evicted, but that all other persons who hold under the buyer should enjoy the thing. There is an exception to this rule when the first vendee alienates *without warranty*, because he is then without any interest whatever in the matter. But, in every other case, his right of action is complete the moment the person to whom he sold loses it by a superior title." (Dig., Lib. 21, tit. 2, L. 61; Pothier, Vente, No. 97.)

Chief Justice Merrick, in Bertrand *v.* Blouin, (13 La.

An., 145), doubts whether the dictum as to the exception of a sale without warranty is good law. Dispossession is not necessary to constitute eviction; it suffices if a perfect title exists in some third person whereby it is rendered legally certain that the vendor has no legal title.

McDonald *v.* Vaughan, 14 La. An., 718.
Butler *v.* Watts, 13 La. An., 390.
Succ. of Coxe, 15 La. An., 515.
Kling *v.* Sejour, 4 La. An., 129.

In this last case the Court say: "It was equally unnecessary for him to suffer an actual eviction from the premises by the execution of the writ of *habere facias possessionem;* he might well have attorned to the plaintiff after judgment."

Eviction, as defined by the Code, is the loss suffered by the buyer of the totality of the thing sold, or of a part thereof, *occasioned by the right or claims of a third person.* (C. C., 2476; 1 R., 362; 11 Rob., 397.)

It suffices if eviction is pronounced by judgment.

Troplong—Sale, No. 415 and No. 540.
Duranton, vol. 16, No. 248.
Pothier, Vente, No. 85.
Mercedé, sur art., 1640.

It is therefore clear that when Mrs. Gaines recovered the judgments in suits No. 3663 and 6085 against the then possessors, whether they had a subrogation of warranty against the City as original vendor or not, that the immediate vendees of the City could, for their protection, sue her on the warranty to them, and subsequent vendees could sue their immediate vendors on the warranty to them; and the last vendees could, for their protection, sue their vendors on the warranty contained in the act of sale to them, and in all these various sales the warranty exists by operation of law unless

expressly excluded, and such exclusion of warranty is not averred in the answer, nor is there any proof thereof. The practice is for each vendor, when he sells, to subrogate his vendee to the warranty given to him by his vendor, in which event the last vendee can sue any other person through whom he claims title.

It is plain that, in any event, the City is ultimately liable for the original judgments against the present possessors; and if, as defendant contends, there is no subrogation of warranty in the various transfers of the property, the warranty can only be enforced against the City by a circuitous route, or by her immediate vendees; and if her immediate vendees, who have sold to the present possessors, should, for their protection, sue the City on the warranty to them before they have paid to the present possessors, the execution of the judgments in their favor would be suspended until they had suffered loss by actual payment of the judgments against them. Now, none of these parties have sued or will sue; many are dead or insolvent. Is it possible, in such a state of things, that the City is to escape all responsibility? Is not such a case within the principle sanctioned by this Court in the case of Riddle *v.* Mandeville (5 Cranch, 322), where it was held that an endorser of a promissory note who had been adjudged to have no remedy at law against a remote endorser, was entitled to maintain a suit in equity against him on the ground that the original endorser was ultimately responsible for it, and that equity would decree the payment to be made immediately by the person ultimately liable to the person actually entitled to receive the money?

There is no privity between a lessor and an under-lessee. Yet Judge Story says, "If the lessor be insolvent, Courts of Equity would aid the lessor to recover his rent from the under-tenant." (Story's Equity, section 687.)

If the insolvency of the defendants in suits Nos. 3663 and 6085 be an element in the case, it is alleged in the bill (paragraph 15, p. 11), and is admitted by Mr. McConnell, counsel for the City, in his letter of August 20, 1877, in which he says: "Now, the people against whom these illegal judgments are being rendered are, in ninety cases out of every hundred, utterly unable to pay them." (P. 711.) The fact of the non-execution of the judgments is the best evidence of the inability of Mrs. Gaines to collect them.

Chief Justice Marshall, in Riddle *v.* Mandeville, foresaw a case similar to this. He says: "Suppose the vendor of personal property held by a bill of sale containing a warranty of title, and should assign that bill of sale to his vendee, is it clear that on loss of the property through defect of title no recourse could be had to the warrantor of title? The Court is not prepared to answer this question in the affirmative."

The foregoing was nearly completed before I saw the brief of the counsel for the appellant, filed on October 3d.

He relies very much on the single case of Bourguignon *v.* Destrehan (5 La., 116). He has quoted largely from it. Its authority is very much impaired by the fact that it was not argued by counsel; besides, it was a suit for *damages*, and not, as this is, a suit to recover the accessory thing, and it was correctly decided that a possessor for more than a year is not a *trespasser*, and liable as such in *damages*. That view was sufficient to dispose of the case. All the rest of the opinion is *obiter dictum*. I quote part of the opinion omitted by the learned counsel, which will show that a *petitory* action, such as this is, to recover the thing might not have been decided as that case was:

"This case has been submitted to us without argu-

ment or without any points to direct our attention to the matters which the parties might suppose were really in controversy. It was a suit for damages. The vendor and vendee were made parties to the original suit. Boudousquié, party in possession, and Destrehan, against whom this suit is brought for the very same matters; in the first case judgment for possession was given, but the question of damages is yet undecided."

"The second ground on which damages are claimed presents the question as to the responsibility of the defendant in *this form of action* for the rents and profits of the land during the time it was in possession of Boudousquié, his vendee. * * * The question is somewhat novel, for we do not recollect having ever before seen such a suit brought in our Courts. The only grounds on which *we can conjecture* it was supposed the responsibility of the defendant could be maintained, were that the vendee was a *trespasser*, and that the vendor, under whose permission he entered into possession, was also one. If the first proposition be true, then perhaps the other would follow—it being a familiar doctrine of our law that if A commits an illegal act by command of B, they are both considered as actors in the infliction of the injury, and are both liable for the consequences which may follow from it. But after the best consideration we are able to bestow on the case, we are of opinion that the vendee of land who conveys his right in it to another, although his title be a bad one, cannot be considered a *trespasser* and subject to the responsibility of one, if his vendee is suffered to remain in possession long enough to acquire the right of possession. It is true trespass may be committed on land, but in order that the interference, injury, or act may amount to such, it is essential that the *right of possession* in another be disturbed. The action of reintegrade in the civil law, by which possession is restored and *damages* given for the injury inflicted by the trespasser, is confined to the party having the right of possession. At common law the ground of the action of trespass on land is injury to the *possessor*. (Pothier, Possession, Nos. 114 and 115, 4 Kent. Com., 120.)

"By our law if a party illegally entering on land is

suffered to remain thereon for a year, the owner loses the right of possession and is driven to the *petitory action* to recover his property. The rents and profits accruing *after the year*, or the fruits of the land for which the possessor may be responsible, *are given on entirely different principles from those for which reparation is afforded for a trespass*, and his responsibility varies according to circumstances."

The doctrine announced as to the responsibility of the vendor for fruits arising after he has sold the property is entirely *obiter;* it was not necessary to the case, nor is it supported by authority, and the question was not argued. The case was disposed of judicially when the Court came to the conclusion that the possessor for more than a year was not a trespasser, and could not be sued as such, and that in such case the proper remedy was a *petitory* action.

Respectfully submitted.

THOMAS J. SEMMES,
For Appellees.

131-141

Supreme Court of the United States

THE CITY OF NEW ORLEANS, Appellant,

vs.

THE HEIRS OF MYRA CLARK GAINES, Appellees.

A STATEMENT OF MATTERS OF FACT AND LAW IN BEHALF OF THE APPELLEES IN THIS SUIT.

JOHN A. CAMPBELL,
Of Counsel for Appellees.
THOMAS J. SEMMES.
ALFRED GOLDTHWAITE.

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Supreme Court of the United States.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

THE HEIRS OF MYRA CLARK GAINES, APPELLEES.

A Statement of Matters of Fact and Law in behalf of the Appellees in this Suit.

I.

Myra Clark Gaines prosecuted, in the Circuit Court of the United States, at New Orleans, to a final decree in her favor, this suit in equity against the City of New Orleans. The defendant, the City of New Orleans, obtained an appeal, and the cause was transferred to this Court. She died the 8th of January, 1885, after the case was upon the docket. Her lineal heirs became parties, and they respectfully pray that this decree be affirmed.

II.

Myra Clark Gaines, by the judgment of the Probate Court of the City of New Orleans, in the year 1856 (11 La. Ann., 124), in a suit in the succession of Daniel Clark, established the olographic will of her father, Daniel Clark, dated in July, 1813. She was constituted his universal legatee and heir of his entire succession, with a charge to pay a few particular legacies specified. This Court has decreed, conformably, that she was the only legitimate child of her father, Daniel Clark, and en-

titled to his succession, subject to the charges imposed in the will.

Gaines *v.* Hennen, 24 Howard, 553.
Gaines *v.* New Orleans, 6 Wallace, 642.
Gaines *v.* New Orleans, 15 Wallace, 624.
Davis *v.* Gaines, 104 U. S., 386.

III.

The controversy disclosed by the record is a demand "*en revendication*," presented to the equity side of the Circuit Court by the plaintiff, Myra Clark Gaines, against the defendant, the City of New Orleans, for the restoration of specific parcels of land within the City, which were an undisputed part of the succession of Daniel Clark at the time of the execution of his will and at the time of his death. These parcels of land were bequeathed in that will to his only legitimate daughter, as a part of the legacy by universal title. Except by the judgment of this Court, in the case cited from the 15 Wallace Reports, she never acquired a rood of it. After the death of Daniel Clark, Beverly Chew obtained the probate of another will of an earlier date (in 1811), and entered upon the administration of the succession of Daniel Clark, with an authority from the legatee designated therein. In 1821 the testamentary executors, with an authority from the legatee, sold at a private sale, without judicial order, to Evariste Blanc. Evariste Blanc sold the same land, 26th September, 1834, to the City of New Orleans. The City subdivided the tract into squares and lots, and highways and streets, and, at different dates between 1834 and 1848, sold all at public auction, save five squares, to a great number of persons, with assurances of title, peaceable possession, and quietude.

IV.

The City retained five squares of that tract. This

was the subject of the suit determined in favor of Mrs. Myra Clark Gaines against the City of New Orleans, and the decision is reported 15 Wallace, 624. The cause of action is the same exhibited in the present suit. The parties are the same, and the titles and questions determined are the same—whether the plaintiff, Mrs. Gaines, with the will of 1813, or Chew and Relf, with the will of 1811, have the best right to the succession of Daniel Clark, or to the Blanc tract.

The City of New Orleans in the first case was a possessor of five squares of land in the tract of land purchased by Evariste Blanc from Chew and Relf in 1821. It had been till then a part of the succession of Daniel Clark. Blanc sold it to the City of New Orleans 26th September, 1834. The City defended the suit against Myra Clark Gaines, and was convicted in this Court as a purchaser in bad faith, and of holding a title that did not transfer the property. It was declared to be the property of her opponent—the plaintiff in that suit and in this suit. The case of Gaines *v.* Hennen is analogous. The property which Hennen held was a part of the succession of Clark, and he derived title through mesne conveyances descending from Chew and Relf and their principal, Mary Clark.

C. C., Art. 2286.
Tarver *v.* Tarver, 9 Peters, 174.
Aurora *v.* West, 7 Wall., 82.
Fouvergne *v.* New Orleans, 18 Howard, 470.
Cromwell *v.* Sac County, 94 U. S., 351.
Thomson *v.* Roberts, 24 How., 233.
Aspen *v.* Nixon, 4 How., 467.
Balot *v.* Morina, 12 Rob., La. R., 552.

The will of Clark dated in 1813 and admitted to probate in 1856, was a revocation of that executed in 1811. The spoliation and suppression of that will did not detract from its validity, nor destroy its operation and

effect. The spoliation simply hindered those interested in acquiring a possession of their rights, and enabled the spoliator to practice fraud and enjoy for a time the fruits of successful spoliation.

The plaintiff, the victim of the rapacity and greed, was at the time ignorant of her loss, and incapable of vindicating her claims or defending her inheritance from lawless usurpation.

Daniel Clark had complied with the requirements of the law in making a transfer of his property after his death by an olographic will. He had manifested his intentions with scrupulous care. There had been no secrecy nor guile in respect to his purposes. His will has since that time been orally proved by persons who were his friends, and who had been told of the contents of the paper. The spoliation did not confer any strength upon any other will, or title upon any other claimant.

Nemo plus juris in aliun transferre potest quom ipse habet.

Balot *v.* Morina, 12 Rob., 552.
3 Touillier, Don. and Testaments, sec. 240.

V.

The above statement is exceedingly clear, but the fact still remains that the will made in 1813 by Daniel Clark was not admitted to probate until 1856. When presented for probate in 1834 by Whitney and wife, and proofs were collected sufficient to establish conviction whenever examined, there was no probate. There was then an attempt to establish it by bill in chancery, and a decision was made in the Supreme Court of the United States that there must be a probate in a Louisiana Court before that Court could acknowledge it.

The will of 1813 is evidence in this cause in consequence of the probate of that will in 1856. It may be received as authentic.

The difficulty to having a probate arose out of the

phraseology of the article of the Civil Code relative to the probate of olographic wills. (C. C., 1655.)

It is worth the while to read this article at this stage of this discussion. In the Revised Code (Art. 1655) the article provides—"The olographic will shall be opened, if it be sealed, and it must be acknowledged and proved by the declaration of two credible witnesses, who must attest that they recognize the testament as being entirely written, dated, and signed in the testator's handwriting; as having often seen him write and sign during his lifetime." The loss or spoliation of the will precluded its probate in the mode prescribed in this article, and as no other section enlarged the scope of this article, and as the Probate Judge would not go beyond the article, Whitney and wife, upon the motion of the defendants, were non-suited. This *pons asinorum* had been, and was for some time, impassable.

The French Tribunals found no difficulty in authenticating wills that had been lost or spoliated. The rules we collect are to authorize proof of the suppression or loss of a will. There should be evidence that the will had once existed. The Judges should examine the facts and circumstances, and determine "*souvrainement*" upon the question. Written evidence of the existence of the will is not necessary; but the evidence should show that the testator had made the will. Evidence may be brought to establish the existence of an olographic will. (16 Dalloz, Jurisp. Gen., pp. 718 and 724, Nos. 2520-1-2-3, and notes; 13 Laurent, Droit Civil, pp. 109-115, Nos. 109-120; 3 Troplong, Don. and Testaments, 374, No. 1445; Gabriel des Preuves, 450-1.) The Supreme Court of Louisiana crossed the bridge in 1856, and the cause of the plaintiff has not been so disturbed as it had been from the cavils and quibbles of the litigation. The judgment of probate recorded a common belief, that Daniel Clark did make a will, signed, dated, and wholly written by him, which acknowledged Myra Clark to be

his only legitimate child ; that he instituted her to be his universal legatee, and that De la Croix and others were the executors appointed.

This will was the product of a man of capacity and position in society. The paper was not the result of any captation, surprise, sinister influence. It was spontaneous—his own handiwork in every line and letter. He pronounced his work to have been well done. He had full time to revoke it—to destroy it—but the testimony tells of care and vigilance. His dying instructions were that the trunk containing it should be carried to one of the executors. His death occurred in August, 1813. There was a war with Great Britain, and so commerce and intercourse at New Orleans was circumscribed. The yellow fever was there, and a visitor at the home, and caused the death of Clark. His house was accessible to but a few. Few persons would be likely to come to him at this time. It was accessible and open to Richard Relf, the executor named in the will of Daniel Clark. Relf was a visitor there the day of his death, and had knowledge of, and was charged to have visited the place of deposit of his will. When Clark died, the will he had made a few weeks before was sought for and not found. Relf produced the will dated in 1811, and in the absence of an act of revocation of the will of 1813 there could be no valid claim set up for the succession of Daniel Clark. The ordinary presumption, that the failure to find the will implied its destruction by the author, could not be supported in this case. There was sufficient testimony to establish the will in 1834 and 1856; the Court of Probate refused to hear at one time, and the Court of Probate at a later date was content. The Supreme Court afforded the necessary aid to supply the consent to the order of probate. The effect of the probate was to stamp with nullity the acts executed by Chew and Relf in the name and with the authority of the legatee of 1811. It

gave to Mrs. Gaines the standing in Court, it being the design of the abstraction of the will, and of other measures to efface knowledge of her name and existence. More than seventy-four years ago was this GREAT TRANSGRESSION committed. The enormous volumes before this Court do not show more than detached fragments of the history. The VICTIM of this wrong-doing was followed with contumely, reproach, abuse, slander, from those who were convicted as possessors of her property in bad faith by the highest tribunals of the country. She endured privation, suffering, sorrow, the whips and scorns of litigation, contentions and quarrel, and scurrilous abuse from bad men. She did not falter, and in the abiding confidence in the Providence of her Creator and the tribunals of her country, she did not hesitate to believe that she or her children would have an award of justice in the time appointed by her Heavenly Father.

VI.

All of the property belonging to the succession of Daniel Clark, and which is included within the scope of the bill of the plaintiff, and which was acquired in September, 1834, from Evariste Blanc three months after the will of 1813 had been propounded for probate in New Orleans, was acquired and possessed by the City as a purchaser in bad faith. The City subdivided it into squares and lots, and sold them at different dates between 1836 and 1848. The conveyances made to purchasers directly, and those which followed upon successive sales, are uniform in the clauses of assurance of title, peaceable possession, and other guarantees, and for the transfer and subrogation to the assigns of the rights and covenants they made. The last vendee of a long series of successive sales has a recourse upon all of those who preceded him. Thus the City of New Orleans, who was the original author of the titles made at the first sales, is here face to face with all of those

who confided in her guarantees. The bills of the plaintiff have comprised all of these, and the plaintiff has obtained decrees against them as possessors in bad faith, and so accountable for all that is included in the conditions of the contract of sale, in consequence of the eviction which is menaced. The judgments are final, for there has been no appeal.

The City of New Orleans being responsible to these parties because of their, and all of them, having an account to settle of the same character against the same party for the same cause, the suit was a legitimate cause. She has warranted all of the titles of the parties and has been the defendant in the suits in support of them.

VII.

The Civil Code provides that in case of the eviction of a vendee the vendor is indebted to the vendee for the *price* of the property sold; to restore *fruits* and revenues to the vendee, if he be liable for them to the owner who evicts him; the damages in excess of the price paid by the vendee; and for the deterioration of the property by his neglect, or for accidents which shall cause it. (C. C., Arts. 2439, 2475, 2476, 2506.)

The Code, in addition, prohibits the debtors in this and similar conditions to renounce their rights or to release them, and that the creditor may be empowered to exercise all of the rights in property, or in action to recover the property, or right of such debtor, which may be made available for the payment of such debts. (C. C., 1987-8-9.)

The Roman jurisprudence did not authorize a creditor to exercise the rights of a debtor, but might confer an authority or compel the debtor to make an assignment of his rights to his creditor or creditors. In a series of successive sales of the same property where each one took a warranty, that jurisprudence did enable the person who was menaced with, or had suffered evic-

tion, to sue any one who preceded him in the series. Pothier adopted the opinion, which was held by a number of other jurists, that each vendor in the line of a succession of sales was presumed to transfer with the property the rights and actions of the debtor to maintain the last of the purchasers in possession and enjoyment and to indemnify him. He was entitled to all of the obligations existing in the line of purchase.

The opinion of Pothier was incorporated into the Code Napoleon and pervades the conveyancing of the notaries. The article of the Napoleon Code was not introduced into the Louisiana Code, but the conveyancing has introduced it, and the various terms employed, of warranty of title, of peaceable possession and enjoyment, from troubles, with subrogation, substitution, and cession of rights and action, so form a part of the notarial acts in ordinary use.

Pothier de Vente, No. 118.
43 Dalloz, Tit. Vente, No. 932.
Troplong de Vente, No. 457.
1 Duvergier de Vente, No. 344.

In the conveyancing in Great Britain and the States using the common law, the covenants for security of title or possession run with the land by force of the words of the covenant. In some States this is provided for by statute. The effect of these rules is to detach the covenants from the individuals and to leave them with the land for use by such owner or possessor as may be required to use them, or may profit by the use, in the event of a disaster such as now has proceeded from this speculation of the City in "*the flush times, so called*," in 1834–5–6. The sale of eleven hundred lots at public auction, indiscriminately, by a vendor who has had direct notice of the defect and dangers of the title, and hence all held under the conditions of purchasers in bad faith, is the case before us. The proof of notice

to the City is in a dissent of the Mayor to the ordinance authorizing the sale and his veto message to the Council.

The purchase by the City of New Orleans in 1834 of the Blanc Tract in defiance of the pendency of the suit of Whitney and his wife, Myra Clark, and the revelations which were then made to the Court of the spoliation of the will of 1813, while Clark was prostrate and dying of the yellow fever at his own house, has not been explained. The Mayor vetoed the ordinance and referred to the petition of the proponents of the will. The Council persevered and succeeded. Explorations, surveys, subdivision of the property into squares and lots and streets and highways followed. The sales amounted to the sum of $609,000, nearly fifteen times the purchase price. The sale embraced the whole property except the blocks or squares which was the subject of the controversy in the suit of Myra Clark Gaines *v.* The City of New Orleans, reported in 15 Wallace, 642. The judgment of this Court in that suit was that Mrs. Myra Clark Gaines was the owner of those squares of land under the bequest contained in the will of her father, which had been admitted to probate in the year 1856; that the City of New Orleans was a possessor in bad faith from the 26th September, 1834, the date of the possession under the deed made to the City at that date; that the City was responsible for all of the fruits and revenues and profits from the date of her deed.

We have stated that this judgment has the attributes of a thing adjudged in the case before the Court.

The cases determined by this Court have necessarily contained an exposure of all of the various questions which have arisen out of such anomalous conditions—the anomalous condition of possession of large and valuable property in a commercial city, continually growing, with the apprehension that sooner or later the conviction would be recorded that the possessor was a pos-

sessor with that indelible mark upon the acts, that he possessed in bad faith.

The authentication of the will in 1856 entitled the plaintiff to commence suits *en revendication.* The multiplicity of suits; the infection of fraud in all of the acts done by such a possessor; the complicated nature of the accounts, and the necessity of a liquidation of the conflicting and reciprocal demands, so that there should be compensation, abatements and a settlement; the decrees of this Court and the orders declaring the taint upon the quality of the possession, and the orders directing restitution of the property ; the reparation by damages of property injured or decayed, and for liquidation of the demands and compensation, where there are liquidated demands, or mutual and exigible debts,—are echoes of the jurisprudence of the Civil Codes. The possessor must hold in good faith. His possession ceases to be so when he learns in any manner, or from any credible source, that he is a usurper of another's right. The decrees declare that there shall be restitution of land and its accession of fruits gathered and consumed—fruits growing, fruits which might have been grown, their equivalent. "*Let us hear the conclusion of the whole matter*: *Fear God, and keep his commandments. For God shall bring every work into judgment, with every secret thing, whether it be good, or whether it be evil.*"

The authorities on the subject are numerous and accordant:

2 Aubry and Rau., p. 390–1-2-3.
4 Touillier, 110.
9 Demolombe, 586.
2 Proudhon, Domaine de Prop., No. 457.
38 Dalloz, Jurisp. Gen., p. 256–257.

The author last cited has a section entitled "When does good faith cease" in the matter of possession of

property? He states a conclusion which is found in the Civil Code of Louisiana, that the possessor ceases to be in good faith at the instant of time that he learns of the defects of his title. It is not necessary that a suit should be commenced, for that it is incontestable that the possessor frequently discovers the defects of his title without a judicial demand. So, the possessor will be deemed in bad faith in whatever manner that he may be informed of the defects of his title.

If it were shown that the good faith of the possessor ceased to exist at some past time, this possessor would be responsible for the fruits from that time, independently of a judicial demand, or citation, or summons. There is a case of a possessor who obtained possession under a will which was found to be forged, and of which he was discovered to be the author; in the nature of things the Court declared he was a possessor in bad faith, and was required to account for fruits commencing at the time of the death of the decedent. (38 Dalloz, Jurisp. Gen., p. 256, No. 348.)

This is possibly a parallel to the case under the consideration of this Court.

The abstraction of the will of Daniel Clark in favor of his daughter was made at a time when he was *articulo mortis* from a pestilential fever. The only object abstracted was the will. The evidence is that Relf obtained the keys and went to the room where the will was, and no other paper was removed from it. He produced the will of 1811 in his custody; the will of 1813 never was produced.

We suppose that if suit had been commenced after the probate of the will in 1856, a suit for the restitution of the fruits from the date of the death of Daniel Clark would not have been chimerical, nor deemed vexatious nor vindictive.

None was commenced, and the accounts of Relf have

never been the cause of a suit on the part of the plaintiff in this suit. It is unquestionable that suspicion did select this as a solution of the mystery.

IX.

The mode of the restitution of *Fruits* and the determination of the various causes of account in a suit like the present, has been prescribed in the Code of Procedure in France. These regulations will be found in the books on procedure.

The article 526 directs there should be a formal statement of the charges of the one party and the discharge of the other, in the form of an account between a creditor and debtor, as in other cases of account in the courts, and that examinations then take place.

The possessor in bad faith who takes possession without a right, whether by fraud or force, contracts with the owner to repair his unwarrantable occupation of the property of another. From this cause, he must not only restore the things he has received, or their value, without any distinction. The word products embraces natural, civil, and industrial fruits to express the fullness of the restitution.

38 Dalloz, Tit. Proprieté, p. 242, Nos. 271–2–3.
12 Merlin Rep., VERBO, Fruits.
5 Touillier, 110–11.

The method by which the account of the fruits and products and the rules for the French tribunals are set forth in the 11 Dalloz, under the title "COMPTE." (Pp. 523, No. 18.) In the note, p. 524, the report of the liquidation of fruits is set forth in full and the whole plan is detailed. The reporter says that experience has demonstrated that it ought to be made according to the same rules and formalities as in other cases. The Courts of the United States have settled their own rules and forms. The Court generally gives directions in the de-

cree ordering the account, if there be any requirement for such. The Court may settle principle in the decree, or all of the principles, and direct the practice.

Field *v.* Hilliard, 6 Cr., 8.
Metsker *v.* Bonebrake, 108 U. S., 66.
Harding *v.* Handy, 11 Wh., 103.
Colombe *v.* United States, 7 Peters, 625.

The statements which have been submitted of the law relative to the adjustment of accounts where there has been an illegal occupation—an occupation of possessors without a title, and with full knowledge of the defects—disclose the fact that such a settlement must be complicated and tedious. In this suit the fact is shown that the settlement may embrace a period commencing about 1834 in some cases, and the number to increase from that time forth. There is a double settlement. The general claim of the plaintiff comprises the lands and occupiers of the lands as possessors in bad faith and with a stern rule of restitution and reparation. The settlement between the City and the vendees of the City have a settlement to conclude, founded upon the contract of sale and the obligations arising upon that contract, because of the failure of the title. There are warranties and covenants for possession and obligations to return the price.

The first necessity is to liquidate the debt. To ascertain what consequence has fallen upon each of the persons concerned in the form of a debt or a credit, the precise relations of debt and credit must be defined. The adjustment of the relations in that form will show what sums are to be exacted, and from whom. The fact that these parties are connected with all of the mutations of the property and the possession of the property, informs that there are reciprocal relations of creditor and debtor existing, arising out of the acts and contracts and failures and insolvencies which have followed

from the abnormal connections of so many. The vices of the titles and the condition of *mala fides* pervading all, show that a liquidation is indispensable. Liquidation implies the ascertainment of the debts. The question which follows is, which debts are exigible, and of whom.

It is not a matter of any importance that the debts arise on the settlement of warranties, or disturbances of possession, or diminution of values, or the determination of liabilities for failing to make fruits, or whether one person is able to pay or is unable. The simultaneous existence of the debts, for whatever cause, growing out of the responsibilities incurred in the relations of the parties, makes it proper to adjust it or to find the means do not exist.

The mutual or reciprocal demands of whatever kind may be disposed of under the law of compensation or confusion.

The statement of the positions of these parties is a vindication of the authority of this Court to deal with all of the questions submitted to the Court.

This suit could not have been brought to a conclusion had the plaintiff been confined to what is termed actions at law. The necessities of the case required an appeal for dispensive and administrative justice. The Courts of Law have no preparation for the oversight, superintendence, and direction of a numerous body of defendants. It cannot stay the hand or restrain by actual interference with their wrongful or injurious acts. The Court of Chancery alone could examine the hundreds—possibly thousands—of claims of different kind arising out of the breaches of covenants and contracts in these sales. The foundation of all of the rights and equities of the plaintiff is the fact of a fraud—a wicked and criminal fraud—committed in the home of a dying man, to the grievous wrong of a helpless

infant, at a long distance and without a power to resist. This was followed afterwards by the array of a Government of a City, with its powers and prejudices to impede or to obstruct.

The Court of Probate denied itself. The Courts of the United States in the City had to be informed that equity powers and practice belonged to them.

The possessors in bad faith seemed stronger than an army with banners. Their principle seems to be, "He that takes it, makes it." The decree of the Court will establish against them that it is our "right makes our might."

JOHN A. CAMPBELL,
Of Counsel for Appellees.

THOMAS J. SEMMES,
ALFRED GOLDTHWAITE.

Office Supreme Court
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131-191

IN THE

Supreme Court of the United States

No. 15.

THE CITY OF NEW ORLEANS, Appellant,

vs.

Mrs. MYRA CLARK GAINES, Appellee.

THOMAS J. SEMMES,
ALFRED GOLDTHWAITE,
Counsel for Appellee.

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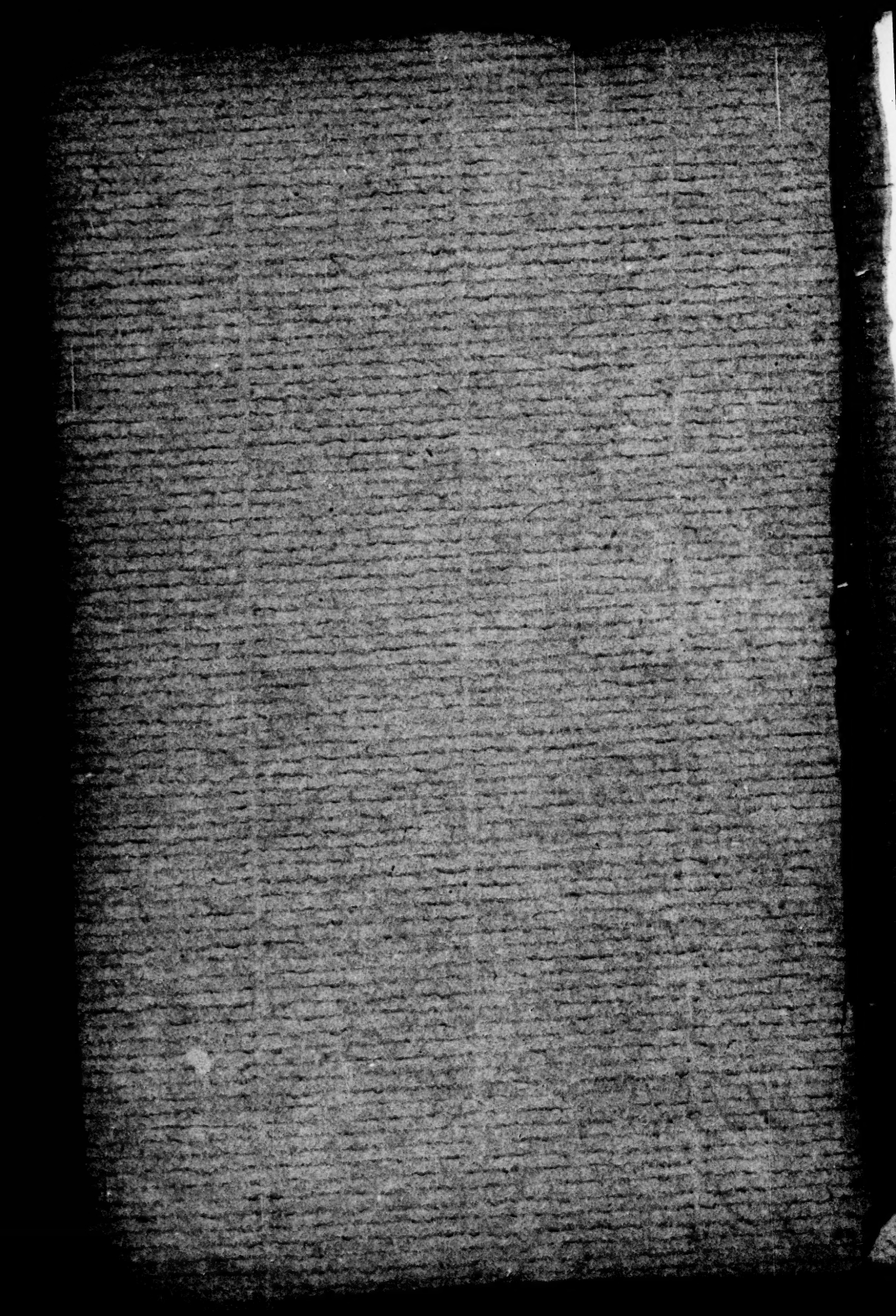

IN THE

Supreme Court of the United States.

No. 15.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

MRS. MYRA CLARK GAINES, APPELLEE.

Since the brief of the appellant was filed we have examined it with care, and submit this supplemental brief to call the attention of the Court to the errors of law and the statements of the Solicitor for the City of New Orleans as to facts which we conceive are not supported by the printed record :

1. His first proposition: "There is no equity jurisdiction to compel a unilateral account where there are no offsets or items to be charged, discharged or surcharged, nor to compute damages for alleged torts."

The account asked for is mutual—a debit and credit accounting. The item of gross receipts, or what ought to have been derived from the property if it had not been neglected by the City or the occupants previous to the defendants in the Monsseaux and Agnelly cases, constituting the debit side of the account—the taxes, improvements, and, in the event of good faith, the amelioration to the property, constituting the credit side of the account; as in the case of ordinary accounts which are mutual.

2. If, as we contend, the account is tedious, difficult, and complicated, then a trial by jury would not give to the complainant relief adequate or commensurate, to say

nothing of the discovery asked for, the fraud charged, and the fact that the bill is a supplementary proceeding—the sequel to long and difficult litigation—in which the rights of complainant were determined.

3. Proposition: "Equity will not deal with an account simply because it is complicated; to sustain a bill for an account there must be mutual demands;—not a single matter, but a series of transactions on one side and payments on the other."

Some of the property was sold by the City in 1837, some in 1846, some in 1848. From that time the lots were sold to numerous parties in different parcels, the interests continually changing. The fruits, civil and industrial, had to be accounted for. The authorities cited, we conceive, do not apply, as the facts make a different case.

4. "Where there is an effort to give equity jurisdiction by a charge that accounts are intricate and can only be taken in a Court of Equity, unless the bill shows circumstances and facts showing the intricacy of the account, the bill will be dismissed." The law of Louisiana with reference to the liquidation of these accounts, extending over a period of nearly fifty years, upon the principles of compensation and confusion (Civil Code, Articles 2207 to 2219), necessarily shows the complexity and intricacy of the account.

5. "A bill in equity cannot be maintained for discovery, if it cannot be maintained for relief, unless the bill shows the discovery to be in aid of a suit at law or the defense of a suit at law, actually pending, or about to be brought, and the action or defense not frivolous."

The answer is, that the Court in the previous cases of Gaines *v.* New Orleans, 6th Wallace, 642, and Gaines *v.* Lizardi and others, known as the Hennen case, in 24 Howard Rep., 553, maintained the bills as ejectment bills with discovery, when fraud was charged. The

authorities in support of the last two propositions are not disputed, but, we submit, do not apply to the facts averred in this bill.

6. "A bill against a corporation, as sole defendant, or a bill that waives answer under oath, is not a bill for discovery."

A bill against a corporation does not require an answer under oath. The waiver of oath was entirely unnecessary.

7. As to *res adjudicata*, because of the determination of suit No. 2695, the fact is that the City parted with the property, except square 46, and four other squares reserved for a public square, in 1837, or previous to 1849. This Court, in New Orleans *v.* Gaines, 15 Wallace, 624, decided that until there was a recovery of the possession, or upon the title, there could be no suit for the mesne profits or accessions. The authorities cited do not apply.

8. "If one demand less than is due him, and do not amend his petition in order to augment his demand, he shall lose the overplus."

The cause of action against each possessor or occupier was distinct, and never could have been united in a Court of Law. No law required Mrs. Gaines to amend her bill in 2695 after the coming in of the answer of the City.

9. "The sale of a thing belonging to another person is null. It may give rise to an action for damages in case of eviction when the buyer knew not that the thing belonged to another person";—as construed by the Supreme Court of Louisiana, refuses damages in case of eviction, when the buyer knew the thing did not belong to the vendor."

Damages are not claimed in this suit, and we can see no application of the principle to the case.

10. Daniel Clark's will of 1811 never was any muniment of title against his daughter after the probate of

the lost will of 1813. The probate made the will effective from the death of Clark.

11. "A warrantor, who is not in possession, in the ~~court~~ of recovery, on the covenant of warranty only owes interest from judicial demand if the amount is liquidated, or from judgment if the amount is unliquidated."

This proposition of law is not disputed.

12. "The warrantee has no right of action against the warrantor until the warrantee is *actually put out of possession.* The return of a writ of possession, to which the warrantor is not a party, is not adequate proof of actual eviction in a suit on the covenant of warranty."

The Supreme Court of Louisiana, in the case of St. Romes *v.* City of New Orleans, 34 An., p. 1201, has decided that actual eviction is not necessary; that the judgment for eviction is sufficient; and this was decided in a suit brought by one of the defendants in the Monsseaux case against the City on its warranty.

12. "The owner of realty, after eviction of the adverse holder, has no action against the vendor of the evicted for rents and profits."

The case of Gillaspie *v.* Citizens' Bank (35 An., 779) was eviction of a possessor in good faith. All that was necessary to be decided in that case was the question of good faith on the part of the bank. That question being adjudged in favor of the bank, it was unnecessary for the Court to make any statement as to liability for rents and profits. The question of pre-~~emption~~ decided in that case had reference to the liability of the bank in damages resulting from an unlawful seizure of the plantation in question under process issued by the bank. Hence the liability of the bank arose out of a tort, to which the pre-~~emption~~ of one year was applicable. And for that reason the Court was very careful, at the close of its opinion, to distinguish the case from

that of Walling's Heirs *v.* Morefield (33 An., 1178), which was the case of a possessor in bad faith.

The prescription applicable is that of thirty years—the prescription applicable to real estate held by a possessor in bad faith.

As to the effort made by the City of New Orleans to defeat Mrs. Gaines' recovery of her land, and the resistance and hindrance, together with the fact that she aided the occupants in all their defenses urged against Mrs. Gaines, (see case of McConnell *v.* City of New Orleans, 35 Ann., 273.)

On page 51 of brief for the City—that there was no honest litigation or controversy, and that decrees *pro confesso* were allowed to pass into final decrees with fictitious and unreal profits allowed—there is no proof to sustain such a charge.

So on page 52—that all the decrees have been sold. There is no attempt to prove such an averment.

On page 55—As to the character or conduct of the Master: There is not a charge made against the character of the Master in the Record. A simple request was made to have another Master (p. 62). The reason for his appointment is obvious. He had an experience derived from his investigations in the Monsseaux and Agnelly cases. He was competent. He had done his work well, and no appeals had been taken, evidencing the acquiescence of the defendants in those cases, and of the City who had aided in the defense. The abuse of the Master is first made known in the brief of the solicitor for the City, filed in this Court.

As to the $34,000 costs in the Monsseaux and Agnelly cases allowed in the decree, and which is assailed in the brief at pages 58, 96, 97: When the Master's report came in, nothing was said about the costs in those cases. The solicitor for complainant made it

a ground for exception to the Master's report. The costs had been taxed in the Mousseaux and Agnelly cases. The judgment of the Court maintained the exception, and, when the decree was made up, the sum of $34,000, *as costs having been taxed in those cases*, was allowed. The Master had nothing to do with the costs. Under article 2506, R. C. Code, the vendor, or City, upon its warranty was liable for all the costs occasioned either by the suit in warranty on the part of the buyer, or by that brought by the original plaintiff.

On page 99—As to the title of the City being correct on its face: It is a fact that the legatee, Mary Clark, under the will of 1811, was never put into the possession of the estate of Daniel Clark by any order of Court. This was decided in the Hennen case, in 24 Howard, 553. Hence she could make no valid power of attorney to Chew and Relf to sell. Chew and Relf, as executors, had no power to sell, except by an order of Court made within the year. The title of the City was necessarily bad. The case of Davis *v.* Gaines, 104 U. S., 386, was decided on the ground that the sale was made by the executors under an order of the Probate Court, and was therefore regular on its face.

On page 114—As to the compromises: It is apparent that Mrs. Gaines did not want to evict a large number of poor occupants. She was well disposed to them and made liberal terms with them, often getting nothing for the title she conveyed or promised to convey. The warrantor was liable to the occupants and to her. The City had obstructed her and was able to pay.

On page 115: The Supreme Court of Louisiana, in the cases of Mrs. St. Romes *v.* City of New Orleans, 34 An., 1201; Rousseaux *v.* New Orleans, and Merchants' Mutual Ins. Co. *v.* City of New Orleans, did not con-

sider that the warrantees were conventions between rogues and in fraud. Recoveries were had for the price by the vendees under Art. 2506, Civil Code.

On page 126: The accusation against the Master is not just. Exhibits C^1 and C^2 were filed with the bill. They were lists of judgments in the Agnelly and Monsseaux cases. An examination of those judgments will show the lots embraced in each judgment. It was much more convenient to deal with the tract of 135 superficial arpents by squares and lots than by names of possessors, and the work could be made clearer to the parties and to the Court.

On page 128 the solicitor finds fault with the figures of the Court, and cannot get the sum of $576,707.92.

The Master, in his report, gives the amount of each judgment in Exhibits C^1 and C^2 with interest added up to January 10, 1881. In some instances interest was for one year, in others for a longer time. The Court took the figures from the Master's report, that sum being the aggregate of the judgments with interest to January 10, 1881.

The Exhibits C^1 and C^2, annexed to the bill, calculated the interest up to the dates of the judgments in 1877, 1878, or 1879. On page 135, as to the renunciation by Mrs. Gaines, in bill 122, of her claim as universal legatee under the will of 1813, this was distinctly argued in the briefs of the counsel for the City of New Orleans in the case reported in 6th Wallace, and is concluded by that case. (See printed Record, p. 499.)

That the judgments in the Agnelly and Monsseaux cases are conclusive against the City, who assisted in defending those cases, and that the City is bound by them, see Chicago *v.* Robbins, 2 Black, 418; Robbins *v.* Chicago, 4 Wallace, 672; Lovejoy *v.* Murray, 3 Wallace, p. 18.

We call the attention of the court to the fact that Mr. McConnell, the counsel for the City of New Orleans in Monsseaux and Agnelly cases, took appeals in 1877 on behalf of the City, and in behalf of numerous defendants (p. 3,875). These appeals were never prosecuted.

Respectfully submitted,

THOMAS J. SEMMES,
ALFRED GOLDTHWAITE,
Counsel for Appellee.

New Levee
Fulton
Front
Delta
Water
Calliope St
Franklin
Deland
St Joseph
St Mary St
Julia
Notre Dame
Canal
Lafayette
Poydras
Gravier
Pontchartrain R.R. Depot
Pontchartrain R.R
Delta
Canal St
Strip of 250 feet
Strip of 200 feet granted to New Orleans, Mobile & Chattanooga R.R. Co. conveyed by Board of Liquidation in the year
Mississippi River
Nov 28th 1871
City of New Orleans
to
Wm Worthington Wells Gaines
Plans for Sale of property prepared at City Surveyors Office and dated December 7th 1867 Property advertised for sale by C.E. Hornsby City Auctioneer 20th January 1868
The Plans represent all the streets (Colored red) as open streets - St Joseph and Notre Dame are permanently closed by the R.R. Co
The red lines show front to which Mayor by Ordinance of the Council No 1482 New Series.
The dotted line indicates the limit of batture falling to the City in full title under Concession June 20th 1857
The figures in the squares indicate the value of said property at this date Jan 1st 1871.
The yellow represents property conveyed by New Orleans & Red River R.R. Co

New Levee
Fulton
Front
Delta
Delord
S. Rampart
N. Rampart
St. Joseph
Julia
Notre Dame
Girod
Lafayette
Poydras
Gravier
Common
Canal
Pontchartrain R.R. Depot
Pontchartrain R.R
Delta St.
Claimed by New Orleans Mobile & Chattanooga R.R. Co
Canal St.
Water
Fence
Pike
L.O.M.&C.R.R
Purchased by New Orleans Mobile & Chattanooga R.R. Co
Claimed by New Orleans Mobile & Chattanooga R.R. Co
Strip 210 feet granted to New Orleans, Mobile & Chattanooga R.R. Co. completed by Board of Improvement in this street
Strip 210 feet granted to New Orleans, Mobile & Chattanooga R.R. Co. completed by Board of Improvement in this street
Mississippi River
The red lines show front to Ch.s Morgan by Ordinance of the Council No. 1482 New Series.
The dotted line indicates the limit of batture falling to the City in full title under concession June 20th 1851
The figures in the squares indicate the value of said property at this date Jan 1st 1871.
No. 1414
City of New Orleans
N.O. M.& C.R.R Co.
Bag 257 No 2.
The yellow coloured areas claimed by New Orleans, Mobile and Chattanooga Rail Road Co
City Surveyor's Office
New Orleans Jan 1st 1871
Sgd W. Mc. Mahon
City Surveyor